



IN THE
Supreme Court of the United States.

SILVER KING COALITION MINES
COMPANY, A CORPORATION,
Petitioner,

vs.

CONKLING MINING COMPANY,
A CORPORATION,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.**

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Silver King Coalition Mines Company, a corporation organized under the laws of the State of Nevada, respectfully presents to this court this, its petition for a writ of certiorari addressed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said court and the clerk thereof to certify to this court the record and proceedings in the case in said court wherein the Conkling Mining Company, a corporation of Utah, is appellant, and the Silver King Coalition Mines Company, a corporation, is appellee (C. C. A. No. 3977); and the record and the proceedings in the case in said court wherein your petitioner is appellant and the said Conkling Mining Company is

appellee, (C. C. A. No. 5188); and the record and proceedings in the case in said court wherein the Conkling Mining Company is appellant and your petitioner is appellee, (C. C. A. No. 5190), together with the opinions of the court therein, for the review and determination of said cases by this court.

In this behalf the petitioner states the following facts:

I.

There is subjoined to this petition a map, marked "Figure 1," showing the Brave Columbia lode, U. S. Lot No. 214, Constitution lode, U. S. Lot No. 215, Cumberland lode, U. S. Lot No. 216, Monroe Doctrine lode, U. S. Lot No. 217, Nero lode, U. S. Lot No. 192, Pirate King lode, U. S. Lot No. 580, Conkling lode, U. S. Lot No. 689, and the Custer No. 2 and Silver Hill No. 4 lodes, Joint Survey No. 4850.

There is also subjoined a copy of a map, "Exhibit 45," showing the surface boundaries of the claims already named, together with the surface boundaries of the Hope, U. S. Lot No. 260, and other claims.

(There is also furnished with this petition, as Exhibits "A" and "B," a transcript of the record in the case, in which there have been two trials, one in respect to the title, and the other upon the accounting, and three appeals; the first, by the respondent complaining of the decree awarding the title to petitioner; the second, by petitioner, complaining of the amount awarded respondent upon the accounting; and the third, by the respond-

ent, also complaining of the amount awarded upon the accounting.)

II.

The Conkling lode mining claim, Lot 689, was surveyed for patent on the 19th day of November, 1889.

The Nero was surveyed for patent April 1, 1881; the Hope, May 16, 1882; and the Pirate King, June 20, 1888.

The patent to the Conkling lode mining claim issued on the 23d day of February, 1892. The Custer No. 2 and the Silver Hill No. 4, Survey No. 4850, were located prior to the location of the Conkling claim, and were valid, subsisting mineral locations at the time of the survey of the Conkling lode, Lot 689, for patent; and so much of the shaded 135.5-foot strip as is shown as "Figure 1" to be included within the Custer No. 2 and the Silver Hill No. 4, was part and parcel of said claims at the time the Conkling lode mining claim was surveyed for patent and the monuments erected to mark its boundaries. Aside from the calls in the Conkling patent, there is no evidence that any portion of this 135.5-foot strip was ever any part of the Conkling lode mining claim as originally located, or as officially surveyed.

III.

The suit was originally commenced by J. Leonard Burch and Nicholas Treweek, who owned a three-quarter interest in the Conkling lode mining claim. These complainants afterwards organized and conveyed to the Conkling Mining Company, the respondent, their interest

in the Conkling lode mining claim. The company, on July 5th, 1908, filed an amended bill of complaint in the United States Circuit Court for the Eighth Circuit, against this petitioner as defendant, and in said suit the jurisdiction of said court attached solely on the ground of the diversity of citizenship of the parties, plaintiff and defendant.

IV.

In the said amended bill it is alleged, among other things, that the Kearns-Keith Mining Company had been the owner of a one-fourth interest in the Conkling lode mining claim, and that this interest had been acquired by your petitioner by consolidation with said company, and that prior to the institution of the suit a large amount of ore had been extracted from the Conkling lode mining claim, both by petitioner and its said predecessor in interest.

V.

Complainant further alleged in substance that your petitioner asserted and claimed that the 135.5-foot strip (from which all but a very small portion of the ore in controversy was extracted) was no part of the Conkling lode mining claim, but was the exclusive property of your petitioner by virtue of its ownership of the Custer No. 3 and the Silver Hill No. 4, Survey No. 4850, which "claims and contentions of said defendant," plaintiff averred were "false and untrue and unfounded in fact." It was particularly alleged in said amended bill as follows:

"That said Custer No. 2 and Silver Hill No. 4 lode mining claims, Survey No. 4850, were, by letters patent dated June 2, 1904, granted from the United States of America to the Belmont Mining Company. That said patent was based upon location notices antedating the location of said Conkling lode mining claim. That as patented, said Custer No. 2 and Silver Hill No. 4 lode mining claims overlapped and included a large area of said Conkling lode mining claim as patented and described in the patent thereof and herein, including within said overlapping all of the areas of said Conkling lode mining claim included within the southwest 135.5-foot strip thereof, except only a small area at the northwest corner of said Conkling lode mining claim as herein described; and particularly included within said overlap, all that portion of said 135.5-foot strip wherein said ore was discovered and contained as aforesaid, . . . that at and prior to the time of the purchase of said Custer No. 2 and Silver Hill No. 4 mining claims as aforesaid, no ore had been found or developed within the said claims, or either of them . . . except the aforesaid ore bodies developed prior to said purchase within said area overlapping said Conkling lode mining claim. . . ."

It is next alleged in the bill that the purchase by the Kearns-Keith Mining Company of said Custer No. 2 and Silver Hill No. 4 claims, which included said 135.5-foot strip, was with the fraudulent intent to deprive its tenants of their just proportion of the ore extracted from said strip, and that after developing the said ground, and fully ascertaining the extent of the ore bodies and the value of the ores contained therein, it claimed that said 135.5-foot strip was a part of said two mining claims last named, and was no part of the Conkling claim.

In Paragraph XVII of the bill, complainant says that Nicholas Treweek and J. Leonard Burch were never notified, and neither was complainant ever notified, by the Kearns-Keith Mining Company, of the purchase of said Custer No. 2 and Silver Hill No. 4 mining claims, or permitted to participate in said purchase. We quote the following language from the bill: "That ever since said purchase of said Custer No. 2 and Silver Hill No. 4 claims as aforesaid, your orator, since its incorporation, has been, and prior thereto said Treweek and Burch were, and your orator still is, ready, able and willing to pay and contribute to the defendant for its proper share and proportion, to-wit, three-fourths of the purchase price paid to said Belmont Mining Company for said claims, or such other or further sum as to your Honors may seem meet, and here and now offers to pay the same as this Honorable Court may direct. *That by reason of said purchase of said claims by said defendant*, your orator is, and its grantors have been, greatly and wrongfully prejudiced as tenants in common as aforesaid with said defendant and its said grantor in said Conkling lode mining claim."

In Paragraph XVIII the complainant pleads that it is *entirely helpless to meet the contentions made by the defendant in reference to the boundaries of the Conkling mining claim*, and in Paragraph XIX says that it was the duty of the defendant "as tenant in common with your orator and its predecessors in interest in said Conkling claim * * * to protect the entire extent and area of said claim as described in the patent thereof, and * *

- not to acquire any adverse interest in and to the ground *as bounded and described in the patent.*”

And in conclusion complainant prays, among other things, that the defendant be adjudged and decreed to have purchased and to hold said Custer No. 2 and Silver Hill No. 4 claims in trust for complainant, as to an undivided three-fourths interest.

The answer of the defendant admitted that Treweek and Burch, about the 17th day of September, 1908, conveyed to complainant corporation all their right and title in and to the Conkling claim, and assigned to it all the causes of action which they claimed against the defendant.

Defendant also admitted that it succeeded to the interest theretofore owned by the Kearns-Keith Mining Company in the Conkling claim, and that on the 22d day of September, 1903, said company owned a fourth interest in the Conkling claim, and continued to be the owner thereof until it conveyed and transferred its interest to this defendant, namely, on the 31st day of May, 1907.

The defendant admitted that about the 23d of February, 1892, the United States patented to the Boss Mining Company, the Conkling claim, and that in the patent said claim was particularly bounded and described as set forth in the fifth paragraph of the amended bill of complaint; but it is further alleged in the defendant's answer that the description and boundaries of the Conkling claim, as set forth in the bill, is not a true or correct description of said claim, as said claim is bounded and described and delimited upon the ground by the perma-

nent monuments, objects and bearing trees erected to mark its boundaries, and that the said Conkling lode mining claim, as the same is actually located upon the ground, is particularly described and bounded as follows:

Commencing at corner No. 2, the northeast corner of the Conkling claim and the northwest corner of the Arthur claim, from which U. S. Mineral Monument No. 4 bears north 32 deg. 52 min. west 939.3 feet distant, thence from said corner south 61 deg. 21 min. west 1364.5 feet to *corner No. 3*, the northwest corner of said Conkling claim; thence south 21 deg. 09 min. east, 600 feet to *corner No. 4*, the southwest corner of said Conkling claim, thence north 61 deg. 21 min. east 1364.5 feet to corner No. 1, the southeast corner of said Conkling claim, thence north 21 deg. 09 min. west 600 feet to corner No. 2.

The defendant, by its answer, admits that it claims an exclusive interest in and to the southwest 135.5-foot strip claimed by the complainant to be a part of the Conkling claim, and admits that it asserts that the boundaries of the Conkling claim, as described in the amended complaint, were not the proper boundaries thereof, so far as said description includes said 135.5-foot strip.

The answer alleges that the ground held by defendant and its predecessors, the Kearns-Keith Mining Company, as tenant in common with Treweek and Burch and the complainant, includes no part of said 135.5-foot strip, and that there never was any contention or dispute, as to the location of said Conkling lode mining claim upon the ground, or otherwise.

It is averred in the answer that Thomas Kearns on

the 6th day of April, 1907, secured an option to purchase the Custer No. 2 and the Silver Hill No. 4 lode mining claims from the Belmont Mining Company, and about the 10th of April, 1907, offered to assign and transfer said option to the Silver King Mining Company, predecessor of the defendant, and that the said Silver King Mining Company accepted said offer and purchased said claims from the Belmont Mining Company, directing the latter company to make the deed in the name of Thomas Kearns as trustee for the Silver King Mining Company, and that the deed was accordingly executed on the 12th day of April, 1907, and in June, 1907, Thomas Kearns, pursuant to the request of said Silver King Mining Company, conveyed said Custer No. 2 and Silver Hill No. 4 claims to this defendant; and the defendant admits that the Custer No. 2 and Silver Hill No. 4 lode mining claims were by letters patent of the United States, dated June 2, 1904, granted to the Belmont Mining Company, *and admits that said patent was based upon location notices antedating the location of said Conkling lode mining claim.*

The defendant denies in its answer, that at the time of the purchase of the Custer No. 2 and Silver Hill No. 4 claims by Thomas Kearns, any ore bodies whatever had been found or discovered within any part or portion of said 135.5-foot strip; and says that neither the defendant nor any of its grantors claimed any right or interest in or to any part or portion of said 135.5-foot strip, until the purchase of the same as aforesaid, as part and parcel

of said Custer No. 2 and Silver Hill No. 4 lode mining claims.

And defendant alleges further in its answer that until just before the commencement of this suit, this complainant and said Treweek and Burch had full and complete notice that said 135.5-foot strip was no part or parcel of the Conkling lode mining claim as the same is located upon the ground, and never at any time made any claim or contention that said strip was any part or portion of said Conkling claim, until just prior to the commencement of this suit.

It is alleged in the answer that the boundaries of the Conkling mining claim, as it was originally located and surveyed, and its boundaries marked upon the ground, was 1364.5 feet in length, and included no portion of said 135.5-foot strip, which was part of the Custer No. 2 and the Silver Hill No. 4 claims; and the answer avers that some of the original posts and monuments marking the boundaries of the Conkling lode mining claim, are now standing in place in their original position, and that the bearing trees referred to in the field notes, identifying and locating the position of the monuments of the claim, *are now standing properly marked, and have been so standing ever since the official survey of the claim was made;* and that the original position upon the ground of the Conkling lode mining claim can be definitely and accurately determined from the permanent objects, monuments, bearing trees and other references found in the field notes of the survey of said claim; and the defendant denies that by any means it sought to secure exclusive

ownership of said 135.5-foot strip, except by purchasing the Custer No. 2 and Silver Hill claims.

VI.

As a further defense, your petitioner pleaded in its answer to said amended bill, the ownership of the Constitution, the Cumberland and the Monroe Doctrine claims; and alleged the existence in said claims (crossing the side-lines thereof as shown in Figure 1), of the Crescent fissure vein, and averred that all the ores in controversy had been extracted from the said Crescent fissure vein where it was found at depth beneath the surface of the Conkling and the Silver Hill and the Custer claims.

VII.

Issues having been joined, the parties stipulated that the question of ownership of the premises in controversy and of the vein situated therein was to be first tried and a decision rendered upon those issues; that if the decision of the court as to title and ownership should be in favor of plaintiff's contention, the court would thereupon direct a reference to the master for an accounting for the value of the ore extracted by petitioner. (Trans., p. 67; C. C. A. No. 3977.)

VIII.

A trial was had before Hon. John A. Marshall, the then Judge of the Circuit Court, and on July 12, 1912, a decision was rendered, on the issue of ownership of the 135.5-foot strip, and the claim of extralateral rights, in

favor of defendant, and findings and decree were directed to be made accordingly. (Opinion, Trans., pp. 257-263; C. C. A. No. 3977.)

Thereafter, and on August 5, 1912, a decree was entered directing a dismissal of the action and awarding defendant its costs. (Trans., p. 263; C. C. A. No. 3977.)

On or about the 13th day of January, 1913, plaintiff was duly allowed by said Hon. John A. Marshall, Judge of said Court, an appeal from his said decree to the United States Circuit Court of Appeals for the Eighth Circuit, and it was ordered that a certified transcript of the record and all proceedings in the said case be forthwith transmitted to the said United States Circuit Court of Appeals.

IX.

A certified transcript of the record and of all proceedings in the case was duly so transmitted to the said United States Circuit Court of Appeals, and on February 12, 1916, the Circuit Court of Appeals filed its opinion reversing the decree of the chancellor below and remanding the cause for further proceedings consistent with the views expressed in the opinion. (See opinion Circuit Court of Appeals in 230 Fed. 553.)

A petition for rehearing filed in the Circuit Court of Appeals by your petitioner was denied on June 9, 1916.

X.

On July 6, 1916, petitioner applied to this Honorable Court for a writ of certiorari to the Circuit Court of Ap-

peals for the Eighth Circuit, to review its decision with respect to the title to the ground and the ore bodies in dispute, but it was contended by respondent that the judgment was not final, and, on about the 15th day of November, 1916, this Honorable Court, without opinion, entered its order denying the application for a writ of certiorari.

Thereafter, and in due season, the mandate of the Circuit Court of Appeals for the Eighth Circuit was forwarded to the District Court in and for the District of Utah, and the latter court entered an interlocutory decree requiring the defendant to account. The hearing was begun before Hon. Tillman D. Johnson on May 7, 1917, and resulted in a decree, filed March 1, 1918, in favor of respondent and against your petitioner for the sum of \$542,222.59.

On to-wit the 17th day of April, 1918, your petitioner was duly allowed by the said Hon. Tillman D. Johnson, an appeal from his said decree, to the United States Circuit Court of Appeals for the Eighth Circuit, and it was ordered that a certified transcript of the record and all proceedings in the said case should be forthwith transmitted to said Circuit Court of Appeals.

XI.

A certified transcript of the record and of all proceedings in the case was duly so transmitted to the said United States Circuit Court of Appeals, and, by stipulation of the parties, the entire record theretofore transmitted to the Circuit Court of Appeals by the respondent here upon its appeal from the decree entered against it by the Hon.

John A. Marshall, was made a part of the record upon the appeal allowed petitioner from the decree entered against it by the Hon. Tillman D. Johnson as aforesaid.

XII.

The respondent also was duly allowed by the Hon. Tillman D. Johnson, an appeal from the said decree.

XIII.

On December 19th, 1918, the Honorable Circuit Court of Appeals for the Eighth Circuit filed its opinion modifying the decree of the District Court by adding thereto, pursuant to the appeal of respondent, the sum of \$27,000, and ordered that, as thus modified, the decree should stand affirmed. (Opinion, Trans., pp.)

XIV.

Petitioner seeks a review:

1. Of the decision of the Court of Appeals reversing the decree of Hon. John A. Marshall, which upheld petitioner's contention that the 135.5-foot strip is not part of the Conkling lode mining claim, but is the property of petitioner by virtue of its admitted ownership of the Custer No. 2 and the Silver Hill No. 4 lode mining claims, Mineral Survey No. 4850; and upheld also petitioner's claim of extralateral rights upon the Crescent fissure vein through planes drawn downward through the end lines of petitioner's said three claims hereinbefore named. (See "Figure 1.")

2. Of the decision of the Court of Appeals in respect

to the amount of the judgment awarded in favor of respondent.

FIRST: We will state briefly the position of the Court of Appeals in respect to the ownership of the 135.5-foot strip and the extralateral rights claimed upon the Crescent fissure vein by the defendant as expressed in the opinion of Sanborn, J., reversing the decree of Judge Marshall.

The Court of Appeals holds:

(a) That the patent for the Conkling lode, Lot No. 689, was for a claim 1500 feet in length and that the calls therein, "Thence second course south 60 deg. 45 min. west 1500 feet to *corner No. 3*; and thence third course south 21 deg. 9 min. east 600 feet to *corner No. 4*," are not calls for monuments, and that, therefore, no evidence was admissible to prove that the official monuments or posts erected in the patent survey to mark the northwest and the southwest corners of the Conkling claim respectively were only 1364.5 feet distant from the respective easterly corners of the claim; and that the chancellor erred in receiving such evidence, and in finding therefrom that the Conkling claim was only 1364.5 feet in length, thus excluding from its boundaries the 135.5-foot strip in which practically all the ore in dispute had been found. (See subjoined map, Figure 1.)

(b) That the evidence produced, which consisted of the field notes of the Conkling lode mining claim, Lot 689, the Pirate King, Lot No. 580, the Nero, Lot No. 192, the Hope, Lot No. 260, the Arctic, Lot No. . . . , and other contiguous claims, and the testimony of various deputy min-

eral surveyors who found the post marking the northwest corner and the post marking the southwest corner of the Conkling, Lot 689, and the post marking the southwest corner of the Pirate King, Lot No. 580 (identical with post 3, northwest corner of the Conkling), each in a mound of stones 1364.5 feet distant from the easterly end-line of the Conkling claim, each post standing in substantially correct relation to its bearing tree as described in the field notes, was not sufficient to prove that, as originally monumented for patent, the Conkling claim was only 1364.5 feet in length, in view of the fact that the patent calls for a claim 1500 feet in length, and an area of 20.45 acres.

(c) That there is a *presumption* that, at the respective points of discovery shown on "Figure 1" as being in the exact center of the Constitution, the Cumberland and the Monroe Doctrine claims, a vein coursing substantially parallel to the side-lines of said claims, was the original discovery vein in each of the said claims respectively, and that the affirmative evidence produced by your petitioner to the effect that there was no such vein or lode in either of said claims disclosed at either of said points of discovery or elsewhere in either of said claims, was insufficient to overcome said *presumption*; and that, therefore, the said Crescent fissure vein was not shown to be in either of said claims, the discovery vein; and hence petitioner has no extralateral rights thereon. (No evidence whatever was given that there was as matter of fact a vein in any one of said three claims coursing parallel or substantially parallel with the side-lines—or any

vein whatever in any one of said claims, except the Crescent fissure vein.)

SECOND: (a) Upon the taking of the account, evidence was introduced showing the full extent of the excavations made in extracting the ores from the Conkling claim, as its boundaries were determined by the Court of Appeals, and also from adjoining ground. The chancellor found that one-seventh of the material extracted was waste. A certain excavation called the 600 stopes was proved to contain 183,523 cubic feet, which gives an ore cavity, deducting one-seventh for waste, of 157,306 cubic feet. The chancellor found that there came from this ore cavity 1777.10 tons of first-class ore and 19,238.51 tons of second-class ore, arriving thereby at the conclusion that first-class ore occupied in place 6 cubic feet per ton and second-class ore 7.62 cubic feet per ton.

Petitioner claims that the record shows affirmatively, by actual documentary evidence, that there came from these excavations not more than 1753.67 tons of first-class and 17,992.02 tons of second-class, and that, therefore, first-class ore cannot be found by the data taken to have occupied less than 6.5 cubic feet per ton or second-class less than 8.1 cubic feet per ton.

The chancellor's finding was based upon a plain mistake made by one of the witnesses, which was pointed out by the petitioner upon its appeal to the Circuit Court of Appeals, and again in a petition for a rehearing.

The ratios 6 and 7.62 were applied by the trial court to all the excavations made in the ground in dispute, and the use of these ratios, instead of 6.5 and 8.1, results in

a judgment for \$53,311.45 (at the values taken by the court) in excess of the amount which would have been decreed if the ratios 6.5 and 8.1 had been taken.

(b) On June 30th, 1908, the respondent procured an order from the chancellor authorizing it to visit the stopes at pleasure to ascertain the value of the ores being removed, and, pursuant to this order, did visit the stopes constantly for a period of four years, and ascertained from time to time the value of the ore being extracted by petitioner. (All the ore was mined from a single ore shoot.)

At the trial respondent failed to introduce any of the evidence which it had thus obtained in respect to the value of the ores in dispute.

It was proved by petitioner that in May and June, 1907, it shipped from the ore body in controversy directly to the American Smelting and Refining Company 659 tons of first-class ore and 259 tons of concentrates (representing 725 tons of second-class ore). The actual metallic contents of these ores were proved by the smelting returns, which were undisputed. It was also proved by uncontradicted testimony that these shipments represented as good ore as was extracted at any time from the ground in controversy. The defendant introduced evidence which proved beyond controversy the prices it received during the whole period of the accounting for ores containing such metallic contents as the ores of said shipments. (Opinion Court of Appeals, p.)

The position of defendant in the trial court and in the Court of Appeals was that, under the above circum-

stances, the value of the ores in dispute should be determined by reference to the metallic contents contained in said shipments and the prices received for ore of such quality during the period of time in which shipments were made from the ground in dispute. There was no other evidence introduced of the value of the ores.

The court awarded compensation to respondent upon the basis of the average value of all the ores shipped by petitioner during the period in question, because petitioner had mixed the ores in dispute with ores from its Silver King mine, and had kept no separate account of the value of the ores in controversy, thus placing a value upon the ores in controversy far in excess of the value thereof as shown by said carload shipments. (See opinion of the Court of Appeals upon the accounting, pp.)

Basing the value of all the ore accounted for upon the metallic contents of the carload shipments, and the prices realized for ore of such quality, the amount decreed plaintiff would not have exceeded ~~\$255,692.00~~^{\$542,222.59}, whereas upon the basis of the average value of all the ore shipped by defendant from its entire mine, the plaintiff is awarded \$542,222.59.

THE QUESTIONS AND PROPOSITIONS OF LAW INVOLVED IN THIS CASE ARE SUBSTANTIALLY AS FOLLOWS:

1. Where a valid location of a mining claim has been made by A, and thereafter B makes a location which adjoins A's location, and applies to have his junior location surveyed for patent, and it is thus officially surveyed and

monuments are erected to mark the corners in such manner that as thus monumented it *does not conflict with A's senior location*—and thereupon B applies for patent for his junior location, posting his notice as required by law within the boundaries of his junior location as officially monumented, so that there is no occasion for A, the owner of the senior location, to file any protest or adverse claim, has the Land Office jurisdiction, when it comes to grant the patent to the junior location, so to describe the boundaries of the junior location as to disregard the monuments erected at the time of the official survey, and insert in the description calls which, if suffered to control the monuments on the ground, will include within the junior location thus patented a portion of the senior location with which the junior location was never in conflict either as located or as surveyed for patent?

2. If the Land Office issues such a patent to the junior location, does the owner of the senior location lose so much of his claim as is thus improperly included in the patent to the junior location?

3. Under the circumstances mentioned in paragraph 1, if the description in the patent to the junior location begins at the northeast corner No. 2, an admitted point, and runs west 1500 feet upon a given course to "corner No. 3," and thence south upon a given course 600 feet to "corner No. 4" (as in the Conkling patent), will this call for 1500 feet prevail over the monument proved to have been erected at the time of the patent survey to mark corner No. 3 of the claim, when so to hold would include within the patent a strip of ground 600 feet long

and 135.5 feet wide, which was then part of subsisting valid prior location (Custer No. 2 and Silver Hill No. 4) ?

4. Is not the call for "corner No. 3," referred to in the above paragraph, a call for a monument, which, according to the general rule, should control the distance given?

5. If a senior and junior location lie side by side, and the *junior* location is surveyed for patent, and, as the law requires, monuments are erected at each corner to mark its boundaries, and thereafter a patent is applied for and the claim as officially monumented does not conflict with the *senior* location, but, when the patent issues, the *junior* location is so described therein that it embraces and includes a large portion of the *senior* location, and thereafter patent is issued to the *senior* location, which patent includes the area theretofore improperly included in the *prior* patent to the *junior* location, is the owner of the junior patent, but *prior location*, precluded from showing the true position of the official monuments erected to mark the boundaries of the junior location, because the patent to the junior location does not call for monuments, notwithstanding that if the owner of the senior location is thus precluded, and is compelled to submit to the description in the patent to the junior location, a large portion of the senior location will thereby be lost to the owner of that location and become the property of the patentee of the junior location?

6. Does the following language of the Conkling patent preclude the owner of the adjoining Custer No. 2 and Silver Hill No. 4, *admittedly prior locations*, from show-

ing the actual position in which corner No. 3 and corner No. 4 of the Conkling claim were erected at the time of the survey of that claim for patent:

“With magnetic variation 17 deg. and 20 min. east.

Beginning at corner No. 1, a pine post four inches square marked U. S. 689 p. 1.

Thence first course north twenty-one degrees and nine minutes west three hundred feet to discovery point six hundred feet to corner No. 2, a pine post four inches square marked U. S. 689 p. 2, being also corner No. 4, of Lot No. 191, the Lincoln lode claim, and corner No. 2 of Lot No. 580, the Pirate King lode claim from which U. S. mineral monument No. 4 bears north thirty-two degrees and fifty-two minutes west nine hundred and thirty-nine and three-tenths feet distant, and a pine tree four inches in diameter marked U. S. 689 P. 2 B. T. bears north thirteen degrees west twenty-eight feet distant.

Thence second course, south sixty degrees and forty-five minutes west one thousand five hundred feet to corner No. 3.

Thence third course south twenty-one degrees and nine minutes east six hundred feet to corner No. 4. Thence fourth course north sixty degrees and forty-five minutes east one thousand five hundred feet to corner No. 1, the place of beginning; said Lot No. 689 extending one thousand five hundred feet in length along said Conkling vein or lode, and containing twenty acres and forty-five hundredths of an acre of land more or less.”

7. The question is as to the true location of the northwest corner of the Conkling mining claim surveyed for patent in 1889. There was introduced at the trial the original field notes made by the deputy mineral surveyor who surveyed the claim for patent, and in said field notes

the statement is contained that said northwest corner is identical with the southwest corner of the adjoining Pirate King lode mining claim, Lot 580, (shown on Exhibit 45, subjoined to this petition,) which claim was surveyed a year before the Conkling. The field notes of the Pirate King were also introduced in evidence, and it is stated therein that the northwest corner of said Pirate King claim is identical with the southwest corner of the adjoining Nero lode mining claim, surveyed about seven years before. (See Exhibit 45.) The field notes of the Hope lode mining claim, shown on said exhibit, were also introduced in evidence, from which it appears that the easterly end-line of the Hope claim is approximately identical with the westerly end-line of the Nero claim. The Hope claim is platted on Exhibit 45 by reference to a permanent shaft on said claim called for in its field notes. All the claims shown on Exhibit 45, according to the undisputed evidence in the case, are platted from the original field notes and the original monuments erected to mark the boundaries of said claims, including, as we contend, the Conkling claim.

In the official field notes of the Pirate King claim (Exhibit M) there is a call for a bearing tree to be found at a point south 4 deg. 15 min. east 28 feet distant from the southwest corner post No. 3 of the claim, said tree being described as a "balsam pine 14 inches in diameter"; and in the field notes of the Conkling claim, it is stated that there is found 28 feet distant from post No. 3 (the northwest corner of the Conkling) "a balsam 14 inches in diameter."

The corners of these two claims were found, marked by posts properly scribed, each standing in a mound of stones side by side, by a deputy mineral surveyor in June, 1902, while he was making an official survey of the Custer No. 2 and Silver Hill No. 4 claims. It was proved, without dispute, at the trial that the balsam pine referred to in the field notes of the Conkling and the Pirate King was still standing. The posts were found *at almost the exact distances* from the bearing tree specified in the respective field notes, although not upon the course described.

We deem it impracticable, in the space to which we must confine this petition, to give all the evidence relating to the true position of the northwest and southwest corners of the Conkling claim, and beg to refer the court, for a full statement of the evidence upon the point, to the brief which accompanies this petition, and in which the evidence is set out *in extenso*. The question of law arising upon this proposition is: Was the Court of Appeals justified in setting aside the finding of the chancellor as to the original position of the northwest and southwest corners of the Conkling claim, based as it was upon the evidence here sketched and fully set forth in the brief, there being an entire absence of evidence that any post marked as the northwest corner or as the southwest corner of the Conkling had ever been seen anywhere, except at the points claimed by defendant.

8. Where there is a vein or lode crossing the sidelines of the Constitution, Cumberland and Monroe Doctrine lode claims, almost at right angles, as shown in Figure 1 in the subjoined diagram, and the ore body in

dispute is found in this lode at depth in and underneath the Elephant stope, shown in the diagram, is the owner of the said three claims entitled to the ore by virtue of the right to pursue the vein on its dip beyond planes drawn downward through the end-lines of said three claims, *only upon proof that this cross vein was the discovery vein in each claim?*

(a) Must extralateral rights upon this cross vein be denied if there is in each of the claims a vein coursing substantially northwest and southeast, parallel to the side-lines?

(b) If extralateral rights must be denied upon the cross vein, if there is found in each claim respectively a vein coursing parallel to the side-lines thereof, was the Court of Appeals justified in reversing the finding of the chancellor that in neither of said claims was there to be found any such vein, basing the reversal solely *upon the presumption* that there was found by the locator of each claim respectively, a vein coursing substantially parallel to the side-lines thereof, the only *evidence* upon the point being that given on behalf of petitioner, *that no such vein was found in either of said claims?*

(c) If it is to be presumed, as held by the Court of Appeals, that there is in each of said three claims a vein coursing parallel to the side-lines thereof, and that the uncontroverted evidence of the petitioner to the contrary was not sufficient to overcome *such presumption*, does it follow under the logic of the decision of this court in the case of *Jim Butler Tonopah Mining Company v. West End Consolidated Mining Company* (U. S. Supreme

Court Advance Opinions 1917-1918, No. 16, July 5, 1918), that extralateral rights through the end-lines of said claims must therefore be denied the defendant? Or may it not be held, under the logic of the decision just mentioned, that the defendant may have extralateral rights both upon this cross vein and upon any veins running parallel to the side-lines of said claim, if any such veins shall hereafter be found to exist?

9. Where practically all the ore in controversy was taken from within the 135.5-foot strip in good faith, the defendant believing and having solid grounds for that opinion (as held by the Court of Appeals), that it was the owner of said strip, and believing also that it was entitled to the extralateral right as asserted and all the ore having been contained in the Crescent vein, was the burden upon the defendant to prove the value of the ore in controversy because it mixed and sold it with other ores from its mine, without keeping any separate account of the value of the ore in dispute, when the evidence of the plaintiff itself showed that in June, 1908, it procured an order from the chancellor authorizing it to visit the stopes in question for the purpose of ascertaining the value of the ores being extracted from the ground in dispute, *and that for that purpose it did, by its agents, continue to make such visits almost weekly for a period of four years*, the plaintiff failing (a large number of the witnesses being available for the purpose) to introduce in evidence a syllable of testimony regarding the value of the disputed ores as ascertained by it during the four years mentioned?

(a) Regardless of the burden of proof, was it not the duty of the trial court in determining the value of the ore for the purpose of fixing the amount due to the plaintiff, (in view of the evidence of values possessed by plaintiff and withheld by it) to accept the evidence of the defendant showing that in the year 1907, there were shipped from this ore body 659 tons of crude or shipping ore, and 725 tons of second-class ore, (designated in the record as the K.-K. shipments), the mineral contents of which are proved by the smelting returns, *witnesses for the defendant testifying that this ore was equal to the best ore ever shipped from the stopes*, and the record furnishing evidence of the prices realized by the defendant during every day of the accounting period for ores containing the metallic contents of these 1384 tons; the record also containing evidence that there were shipped from the same ore body, between June and December, 1916, 298 tons of ore, the mineral contents of which were no greater per ton than the mineral contents of said K.-K. shipments;—the record also showing that in the said six months period the crude ore from the defendant's mine, with which the disputed ores were mixed, averaged \$52.17 per ton, and the concentrates \$36.84 a ton, while the ore from the ore body in dispute averaged during the same period, the crude \$38.80 a ton, and the concentrates \$32.25 a ton, *the record containing no other evidence of the value of the ores in dispute*, except that during the trial one of the witnesses for plaintiff was sent into the stopes out of which the ore in dispute was extracted, and secured a specimen of high-grade ore which assayed 76 per cent

lead, which specimen was shown to two witnesses who had worked in the stopes ten years before, and who testified that the ore they worked in was like the specimen exhibited.

(b) Was not the Circuit Court of Appeals in error in upholding the finding of the trial court that there was no substantial evidence of the value of the ores in dispute, and that compensation should be awarded the plaintiff upon the basis of the average value of all the ores shipped from the defendant's mine (with which the ores in dispute were mixed) during the period of time when the disputed ores were being sold, when such average value is far in excess of the value of nearly 1700 tons of the disputed ore, especially in view of the fact that the plaintiff in its amended answer filed in 1909, admitted that it had ascertained the value of the disputed ores theretofore and then being extracted from the ground in dispute, had at the trial the means of proving the value of the ore, and suppressed such evidence?

10. In arriving at the volume of ore extracted it was deemed necessary by the trial court to determine the number of cubic feet per ton occupied by first and second class ore respectively in place in the mine. A certain excavation called the "600 stopes" was proved to contain 183,523 cubic feet. One-seventh of the material extracted from it was found to be waste, leaving a cavity for ore of 157,306 cubic feet. A witness for the plaintiff, who had no knowledge of the facts first hand, was called as an expert, and assuming that the record showed that this ore cavity produced 1777.10 tons of first-class ore and

19,238.45 tons of second-class ore, calculated that the first-class ore occupied in place in this cavity 6 cubic feet per ton, and the second-class ore 7.62 cubic feet per ton, and by referring these ratios to all the cavities made in the ground in dispute, the court determined the total tonnage extracted of first and second class ore.

(a) If the record shows, as it does without dispute, and by clear and satisfactory documentary evidence, that out of the ore cavity of 157,306 cubic feet there were extracted only 1753.67 tons of first-class, and only 17,992.02 tons of second class, it must be found as an arithmetical certainty that first-class ore occupied in place not less than 6.5 cubic feet per ton, and second-class ore not less than 8.1 cubic feet per ton; and if, applying these latter ratios to all the cavities out of which the ore came, the volume is so reduced that the amount of the judgment should be \$53,311.45 less than the amount awarded by the court, ought not the Court of Appeals to have made this reduction in the amount awarded in the decree?

THE GROUNDS JUSTIFYING THE ISSUANCE OF THE WRIT.

And your petitioner further avers that the present case is one in which it is proper for this court to issue a writ of certiorari for the following reasons among others:

1. The Government of the United States has issued thousands of patents calling only for "corners" where there is a conflict between the claim as monumented in the patent survey, and the calls in the patent, and it is undeniable that in the mining camps of the west mining is every day being carried on in the belief that the official

monuments in their proper position conclusively determine the boundaries of a claim, and if this is not the law, and the boundaries are of no consequence, or may be of no consequence, depending upon the particularity with which they are referred to in the patent,—conflicts between mining claims exist as a matter of law, where, as matter of fact, there is no conflict, and hence no man may rely upon his own or his neighbor's monuments as evidence of his boundaries.

2. The mining industry of the west is entitled to know as speedily as possible from the highest tribunal in the land whether the boundaries of a mining claim are those marked out and monumented upon the ground, or whether the calls in the patent may require the courts to fix the boundaries irrespective of such monuments.

3. There is now no certainty as to the rights of owners of contiguous patented claims, if either was patented prior to the Act of Congress of April 28, 1904; since, according to the decision of which petitioner complains, the boundaries between neighboring claims depend, not upon the monuments erected to mark them in the official patent survey, but upon the language used by the scriveners in the Land Office in the preparation of the prior patent.

4. There is grave doubt, as your petitioner is informed and believes, whether it really be law, where there is a conflict between the calls in the patent and the official monuments on the ground, that the owner of a claim may mine beyond his monuments if he is yet within the calls of his patent, and grave doubt whether a neighboring

claim owner is prevented from mining up to his neighbor's line as marked by the official monuments of his claim, because of the language of his neighbor's patent: so that the decision of the Court of Appeals has cast a cloud upon innumerable mining titles, depending upon official monuments for their validity.

5. Because there is a conflict between the decision of the Court of Appeals in this case and the decision of the Supreme Court of the State of Utah in the case of *Grand Central Mining Co. v. Mammoth Mining Co.*, 36 Utah (same case 104 Pac. 573), where it is held that the courses and distances in the field notes and in the patent of a mining claim (patented long prior to the Congressional amendment of 1904), were not conclusive of the true location of the established monuments of the official survey, and that parol testimony was competent to show the original position of such monuments.

6. The decision of the Court of Appeals in this case is also in conflict with its decision in the case entitled "*Resurrection Gold Mining Co. v. Fortune Gold Mining Co.*", 129 Fed. 668, where it was held that it would be proper to receive in evidence the field notes and the testimony of witnesses who knew the location of the original monuments of the Fortune claim, notwithstanding that the only calls for monuments in the Fortune patent were calls for the corners, just as in the Conkling patent.

7. Because the decision of the Circuit Court of Appeals in this case is in conflict with the decision of the Supreme Court of the United States in *McIver v. Walker*,

4 Wheat. 440, where the court, speaking through Chief Justice Marshall (p. 447), says:

"All lands are supposed to be actually surveyed, and the intention of the grant is to convey the land according to that actual survey."

Because if the courts do not hold to the rule announced above by Chief Justice Marshall, which is peculiarly applicable to mining claims, then in all cases arising prior to the Act of Congress of 1904, at least, the owners of the senior locations may be deprived of portions or of all of their claims by patents granted to neighboring junior locations surveyed and monumented so as not to conflict with the senior locations, notwithstanding that in such cases the owners of the senior locations have had no warning that they ought to protest or adverse the application for patent, and have in effect been assured that their rights were not in danger.

8. Because, in the case of *Del Monte Mining and Milling Company v. Last Chance Mining and Milling Company*, 171 U. S. 55, this court, speaking through Mr. Justice Brewer, said (p. 89):

"Our conclusions may be summed up in these propositions: First, the location as made on the surface by the locator determines the extent of rights below the surface. Second, the end-lines, as he marks them on the surface, with the single exception hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike. Third, every vein, 'the top or apex of which lies inside of such surface lines extended downward vertically,' becomes his by virtue of his location, and he may pursue it to any depth

beyond his vertical side-lines, although in so doing he enters beneath the surface of some other proprietor. Fourth, the only exception to the rule that the end-lines of the location as the locator places them establish the limits beyond which he may not go in the appropriation of a vein on its course or strike is where it is developed that in fact the location has been placed, not along, but across, the course of the vein. In such case the law declares that those which the locator called his side-lines are his end-lines, and those which he called end-lines are in fact side-lines, and this upon the proposition that it was the intent of Congress to give to the locator only so many feet of the length of the vein, that length to be bounded by the lines which the locator has established in his location."

See also *Tyler M. Co. v. Last Chance M. Co.*, 171 U. S., at page 91, Circuit Court, District of Idaho, decided by Beatty, District Judge, who in the course of his opinion pertinently observed:

"What reason under the law can be assigned why these rights shall not apply when his location is such that his ledge passes through it in some other way than from end to end? The law does not say that his ledge must run from end to end, but he is granted this right of following 'all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of his surface lines.' Upon the fact that an apex is within his surface lines, all his underground rights are based. When, then, he owns an apex, whether it extends through the entire or through but a part of his location, it should follow that he owns an equal length of the ledge to its utmost depth. These are the important rights granted by the law. Take them away, and we take all from the law that is of value to the miner."

9. Because this court has never denied the locator extralateral rights upon a vein coursing with the nominal end-lines of the claim and crossing the nominal side-lines, on the ground that the course and strike of the discovery vein was parallel or substantially parallel with the side-lines of the claim; and the interests of the mining industry require that this question should be determined by this Honorable Court.

10. Because the position of the Court of Appeals in this case proceeds upon the theory that all doubts and difficulties should be resolved against the defendant, notwithstanding it took the ore in good faith, and awards plaintiff compensation upon the hypothesis that the disputed ores were as good as the average of all the ores shipped from the defendant's mine, *notwithstanding there was no evidence that such was the case*, and notwithstanding the fact that 1384 tons of the ore in dispute were actually shipped to the smelter, and the smelter returns show that this ore was not equal in value to the average ores shipped from the defendant's mine; and this, too, when the record affirmatively shows that the plaintiff had the means of proving the value of the ores in dispute and suppressed the evidence thereof. So that the decision of the Court of Appeals upon this point is in conflict with the decision of this court in *Westinghouse v. Wagner*, 225 U. S. 604; *Clifton v. U. S.*, 4 How. 247; *Graves v. U. S.*, 150 U. S. 118.

See also 1 Wigmore on Evidence, Sec. 285, et seq.

11. Because the principal questions arising are Federal questions, to a review of which upon appeal defendant would have had an absolute right if they had appeared upon the face of the bill, and this defendant submits to this Honorable Court that it is highly desirable in all cases where construction of a Government grant to mineral lands of the United States or the true construction of the mining laws comes in question, affecting the extent of a grantee's rights under the patent and under the law—that a final decision upon such questions should be rendered by this Honorable Court at the first opportunity.

XV.

All the foregoing questions and propositions of law which petitioner states are involved in this case, were duly raised and argued by petitioner in said Circuit (now District) Court, and in said Court of Appeals.

XVI.

Your petitioner is advised and believes, and, therefore, avers, that the Circuit Court of Appeals *erred in holding*:

(a) That the description of the Conkling claim, as found in the patent, is conclusive, and that no evidence was admissible to show the position of the original monuments erected to mark the boundaries of the claim at the time of the patent survey.

(b) That the finding of the chancellor that the original monuments marking the northwest and southwest corners of the Conkling claim stood 1364.5 feet from the easterly corners of said claim was not supported by satis-

factory or sufficient evidence, in view of the fact that the patent calls for a claim 1500 feet in length, and an area of ground containing 20.45 acres.

(c) That your petitioner is not entitled to extralateral rights upon the Crescent fissure vein.

(d) That the amount of ore extracted from the cavities in the ground in dispute should be determined upon the basis that first-class ore occupied 6 cubic feet per ton in place and second-class ore 7.62 cubic feet per ton in place.

(e) That respondent was entitled to compensation for its share of the ores extracted upon the basis of the average value of all the ore shipped by the defendant from its entire mine during the period in question.

XVII.

Your petitioner believes that the aforesaid decrees of the Circuit Court of Appeals are erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress in such cases made and provided.

Wherefore, your petitioner respectfully prays that this Honorable Court may be pleased to grant a writ of certiorari in this case to the Circuit Court of Appeals for the Eighth Circuit, to bring up this case to this Honorable

Court for such proceedings therein as to this Honorable Court may seem just.

SILVER KING COALITION MINES COMPANY,
Petitioner.

FRANK J. WESTCOTT,
Secretary.

CURTIS H. LINDLEY,
W. H. DICKSON,
THOMAS MARIONEUX,
A. C. ELLIS, JR.,
R. G. LUCAS,

Counsel for Petitioner.

STATE OF UTAH,
COUNTY OF SALT LAKE. } ss.

Frank J. Wescott, being first duly sworn, deposes and says: I am an officer of the Silver King Coalition Mines Company, a corporation, the petitioner herein, to-wit, its secretary. I have read the foregoing petition. That the same is true of my own knowledge, information and belief. My knowledge is derived from the record in this case.

..... *Frank J. Westcott*

Subscribed and sworn to before me this .. *3* .. day of February, 1919.

..... *M. L. Guard*

Notary Public, Salt Lake County, State of Utah.

My commission expires. *Jan. 29/22*

Notary Seal

CERTIFICATE OF COUNSEL.

We and each of us do hereby certify that we have severally examined the foregoing petition for writ of certiorari, and the allegations thereof are true as we verily believe, and in our opinion the petition is well founded and the case is one in which the prayer of the petitioner should be granted by the court.

CURTIS H. LINDLEY,
W. H. DICKSON,
THOMAS MARIONEUX,
A. C. ELLIS, JR.,
R. G. LUCAS,
Attorneys for Petitioner.

IN THE SUPREME COURT OF THE UNITED
STATES.

OCTOBER TERM, 1918.

SILVER KING COALITION MINES COMPANY,

A Corporation,

Petitioner,

vs.

CONKLING MINING COMPANY,

A Corporation,

Respondent.

Comes now the Silver King Coalition Mines Company, by Curtis H. Lindley, W. H. Dickson, Thomas Marion-eaux, A. C. Ellis, Jr., and R. G. Lucas, its attorneys, and moves this Honorable Court that it shall by certiorari or other proper process directed to the Honorable, the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, require said court to certify to this court for its review and determination a certain cause in said court of appeals lately pending, wherein originally your petitioner was appellee and the above named respondent was appellant, and which is numbered in said Circuit Court of Appeals 3977, which cause was reversed by said Circuit Court of Appeals, and in which certain further proceedings were had upon an accounting, and in which thereafter your petitioner was appellant, and the above named respondent was appellee and cross-appellant, the records upon said last appeals bearing the

circuit court of appeals Numbers 5188 and 5190; and your petitioner now tenders with its petition certified copies of the entire record in said cause in said Circuit Court of Appeals, including respondent's original appeal, petitioner's appeal, and respondent's cross-appeal, numbers 3977, 5188, 5190, in said Circuit Court of Appeals; said records being Exhibits A and B—including a duly authenticated copy of the opinions of and all proceedings had in said cause in said Circuit Court of Appeals.

CURTIS H. LINDLEY,
W. H. DICKSON,
THOMAS MARIONEUX,
A. C. ELLIS, JR.,
R. G. LUCAS,
Attorneys for Petitioner.

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IN THE
Supreme Court of the United States.

OCTOBER TERM, 1919.

SILVER KING COALITION MINES COMPANY, A CORPORATION, vs. CONKLING MINING COMPANY, A CORPORATION,	}	Petitioner, Respondent.
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Brief in Support of Petitioner's Application for Writ of
Certiorari to the United States Circuit Court
of Appeals for the Eighth Circuit.

STATEMENT OF FACTS.

The Conkling lode mining claim, Lot 689, shown on the maps, Figure 1 and Exhibit 45, hereto subjoined, was formerly the property of Nicholas Treweek and J. Leonard Burch, who owned an undivided three-fourths interest therein, and of the Kearns-Keith Mining Company, a corporation, which owned an undivided one-fourth interest in the claim.

In May, 1907, the petitioner corporation was formed by a consolidation of a number of other companies, among

them the Kearns-Keith Company, and thereby succeeded to the fourth interest of said company in said mining claim.

In January, 1908, suit was brought by the owners of said three-fourths interest against petitioner to quiet title to a certain alleged portion of said mining claim, and for an accounting for ore extracted therefrom by petitioner and its predecessor in interest.

In September, 1908, the Conkling Mining Company was organized, and complainants transferred their three-fourths interest in the claim to said corporation, and at the same time assigned to it all causes of action vested in them against petitioner on account of ores extracted from the claim.

The Conkling Mining Company on July 5, 1909, filed an amended bill, in which it alleged that the Conkling lode mining claim was patented by the United States to the Boss Mining Company on the 23d day of February, 1892. (Paragraph V, Amended Bill, Tr. of Rec., page 8, Case No. 5188.)

By reference to Figure 1, subjoined hereto, the relative positions of the Conkling lode mining claim and the Custer No. 2 and Silver Hill No. 4 lode mining claims will be observed at a glance.

In the shaded portion is shown what will be referred to as the 135.5-foot strip. Within this strip is shown the Elephant stope on the 500-foot level of the mine. All the ore in controversy was taken from this stope and from certain stopes below on the 600 and 700 foot levels.

Practically all the ore in controversy was taken from within this 135.5-foot strip.

As the map shows, a small portion of the Elephant stope extending into what is conceded to be a portion of the Conkling claim.

The patent for the Conkling lode mining claim was issued February 23, 1892.

The patent for the Custer No. 2 and Silver Hill No. 4 (Survey No. 4850) was issued June 2, 1904, to the Belmont Mining Company.

It is an admitted fact in the case that petitioner became the owner of the Custer No. 2 and Silver Hill No. 4 claims by purchase from said company. It is also admitted that the patent conveying said claims to the Belmont Mining Company includes by its terms all that portion of the 135.5-foot strip shown on Figure 1 to be included within said claims, *and that said patent was based upon locations antedating the location of the Conkling claim.* (Amended bill, paragraph . . ., Tr. of Rec., p. . . .)

The contention of the Conkling Mining Company in its amended bill in substance is that the Conkling patent calls for a claim 1500 feet in length; that as thus described it includes within its boundaries the 135.5-foot strip (although it is at the same time admitted in the bill that this strip had been, prior to the location of the Conkling claim, included within the prior locations to the Custer No. 2 and Silver Hill No. 4 claims, and was afterwards included in the patent to those claims issued pursuant to said prior locations); that in the year 1907, the

Kearns-Keith Mining Company discovered ore within this 135.5-foot strip, thereupon claimed that it was not part of the Conkling lode mining claim, and in order to defraud its co-tenants, purchased the Custer No. 2 and the Silver Hill No. 4 claims; that it fraudulently excluded its co-tenants from the right to participate in said purchase by making the purchase secretly, and without the knowledge of its co-tenants, and then claimed the exclusive ownership of the 135.5-foot strip so far as the same was included within the boundaries of the Custer No. 2 and the Silver Hill No. 4 claims, asserting, publicly and otherwise, that said strip was no part of the Conkling lode mining claim; that said claims and contentions of the plaintiff were false and unfounded in fact, but that if the boundaries of the Conkling lode mining claim were ever marked out upon the ground by monuments they were no longer to be found, and their original positions were merely matter of speculation; that complainant was helpless to meet the contentions of petitioner in respect to the original boundaries of the Conkling claim, but that petitioner ought not to be allowed to vary the boundaries of the Conkling claim, as described in the patent, by asserting any conflict between the calls of the patent and the monuments upon the ground; that complainant had been greatly prejudiced in its rights as co-tenant of petitioner in the Conkling claim by the purchase by petitioner of the Custer No. 2 and Silver Hill No. 4 claims; that complainant was informed and believed that the price paid by petitioner for said claims was \$150,000, and it offered to pay its proportion of said price, claiming that

petitioner by said purchase became trustee of said claims for the benefit of complainant, and itself, in proportion to their respective interests in said Conkling claim.

In the amended bill filed by the Conkling Mining Company it is particularly alleged as follows:

*"That said Custer No. 2 and Silver Hill No. 4 lode mining claims, Survey No. 4850, were, by letters patent dated June 2, 1904, granted from the United States of America to the Belmont Mining Company. That said patent was based upon location notices antedating the location of said Conkling lode mining claim. That as patented, said Custer No. 2 and Silver Hill No. 4 lode mining claims overlapped and included a large area of said Conkling lode mining claim as patented and described in the patent thereof and herein, including within said overlapping all of the areas of said Conkling lode mining claim included within the southwest 135.5-foot strip thereof, except only a small area at the northwest corner of said Conkling lode mining claim as herein described: and particularly included within said overlap, all that portion of said 135.5-foot strip wherein said ore was discovered and contained as aforesaid, * * * that at and prior to the time of the purchase of said Custer No. 2 and Silver Hill No. 4 mining claims as aforesaid, no ore had been found or developed within the said claims, or either of them, * * * except the aforesaid ore bodies developed prior to said purchase within said area overlapping said Conkling lode mining claim. * * **"

The bill prays that a decree may be entered quieting defendant's title to a three-fourths interest in the Conkling claim, as described in the bill, requiring the defendant to account for all ores removed from the claim as thus

described, and adjudging defendant to have purchased and to hold the Custer No. 2 and Silver Hill No. 4 claims in trust for complainant and defendant, according to their respective shares in the Conkling claim.

The defendant in its answer admitted that Treweek and Burch had transferred their undivided interests in the Conkling claim to complainant in the amended bill, admitted the corporate capacity of complainant and of defendant, and that the defendant had succeeded to the interests of the Kearns-Keith Mining Company.

The defendant also admitted that the Conkling claim was patented the 23d of February, 1892, but alleged affirmatively that the description thereof set out in the bill was incorrect, and that the true description of the claim, as the same was actually marked out by monuments upon the ground at the time it was surveyed for patents, showed its westerly end line to be only 1364.5 feet from its easterly end line, placing the 135.5-foot strip in controversy wholly outside of and beyond the westerly end line of the Conkling claim, and wholly within the Custer No. 2 and the Silver Hill No. 4 claims, the property of defendant. The defendant denied that it was guilty of any fraud in purchasing the Custer No. 2 and Silver Hill No. 4 claims without advising its co-tenants of its intention to make such purchase, and without permitting them to participate therein, and alleged that there never was any contention on the part of Treweek or Burch or any other person prior to the institution of this suit that the Conkling mining claim as marked out by its official monuments ever included any portion of the 135.5-foot

strip, and averred that the right of the owner of the Custer No. 2 and Silver Hill No. 4 claims to the 135.5-foot strip never was in controversy with the owner of the Conkling lode mining claim.

The defendant admitted the purchase of the Custer No. 2 and Silver Hill No. 4 lode mining claims, but denied that it purchased the same as trustee for its co-tenants in the ownership of the Conkling lode. The defendant also alleged in its answer the ownership of the Brave Columbia, Constitution, Cumberland and Monroe Doctrine lode claims, shown on Figure 1 and Exhibit 45, subjoined to this brief, and averred that in said mining claims there is a vein or lode of rock in place bearing gold, silver, lead, and other valuable metals, which on its course and at its apex crosses the located easterly side line of the said Brave Columbia mining claim, and thence on its course westerly and at its apex passes through and crosses the westerly located side line of the said Brave Columbia, and thence on its course or strike and at its apex traverses the said Constitution mining claim, crossing both of the located side lines thereof, and thence on its course or strike and at its apex traverses the said Cumberland mining claim, crossing both the located side lines thereof, and thence on its course or strike and at its apex it traverses the said Monroe Doctrine mining claim, crossing both the located side lines thereof.

That said vein dips in a southerly direction and in its course downward so far departs from a perpendicular that it passes beyond the legal side lines extended downward vertically of each of said mining claims, so owned

by this defendant, and thence, continuing on its dip or course downward, passes into, beneath and beyond the exterior boundaries extended downward vertically of the said Conkling mining claim, not only as the same is bounded by the monuments upon the ground, but as the same is described by the calls in the patent.

The defendant further alleged in its answer that all the ores at any time mined or removed by the defendant or any of its predecessors in interest from beneath the surface of said Conkling mining claim lay in and belonged to and were a part of the said vein or lode so having its top or apex in the said mining claims of this defendant as aforesaid, and between planes, one drawn through the easterly side line of the said Brave Columbia, and extended as aforesaid, and the other through the westerly located side line of the said Monroe Doctrine mining claim extended as aforesaid.

On June 30, 1908, (before the filing of the amended bill) the then complainants, Treweek and Burch, procured an order from the Chancellor, Hon. John A. Marshall, authorizing complainants, their agents and servants, "to measure and determine the amount and value of the ore that may have been mined by the defendant company from and beneath the surface of said Conkling claim."

In the amended bill of complaint filed by the Conkling Mining Company on July 5, 1909, there is found the following paragraph:

XV.

"Your orator further alleges that under and pursuant to an order of this Honorable Court, made herein on the thirtieth day of June, 1908, permitting the then complainants herein, Nicholas Treweek and J. Leonard Burch, with their experts, agents and surveyors, the free and unmolested right to enter upon the aforesaid underground workings for the purpose, among other things, of measuring and determining the amount and value of the ore that had been mined by the said defendant company underneath the surface of said Conkling and Arthur Lode Mining Claims, the said Treweek and Burch were able for the first time to, and did, ascertain the actual facts in respect to said secret underground workings as aforesaid, underneath the surface boundaries of said Conkling Lode Mining Claim as described in said patent and herein, within planes extended downward vertically, and of the location of the ore body within said Conkling Lode Mining Claim, and the character and extent of the ore body developed therein, and of the importance and great value of said Conkling Lode Mining Claim, which is only valuable for the ores therein contained."

Issues having been joined the parties stipulated that the question of ownership of the premises in controversy and of the vein therein was to be first tried, and a decision entered upon those issues; that if the decision of the Court as to the title and ownership should be in favor of the plaintiffs' contention, the Court would thereupon direct a reference to the master for an accounting of the value of ore extracted by defendant. (Tr. p. 67, Case No. 3977.)

PLAINTIFF'S CASE.

Upon the trial before Marshall, J., pursuant to the foregoing stipulation, plaintiff introduced in evidence its patent to the Conkling lode mining claim, and rested.

In the patent the Conkling mining claim is described as follows:

With magnetic variations 17 deg. and 20 min. east.

Beginning at corner No. 1, a pine post four inches square, marked U. S. 689 p. 1.

Thence first course north twenty-one degrees and nine minutes west three hundred feet to discovery point six hundred feet to corner No. 2, a pine post four inches square marked U. S. 689 p. 2, being also corner No. 4, of Lot No. 191, the Lincoln lode claim, and corner No. 2 of Lot No. 580, the Pirate King lode claim from which U. S. mineral monument No. 4 bears north thirty-two degrees and fifty-two minutes west nine hundred and thirty-nine and three-tenths feet distant, and a pine tree four inches in diameter marked U. S. 689 P. 2 B. T. bears north thirteen degrees west twenty-eight feet distant.

Thence second course, south sixty degrees and forty-five minutes west one thousand five hundred feet to corner No. 3.

Thence third course south twenty-one degrees and nine minutes east six hundred feet to corner No. 4.

Thence fourth course north sixty degrees and forty-five minutes east one thousand five hundred feet to corner No. 1, the place of beginning; said lot No. 689 extending one thousand five hundred feet in length along said Conkling vein or lode, and containing twenty acres and forty-five hundredths of an acre of land more or less."

THE DEFENDANT'S CASE.

The defendant then proceeded with its evidence to establish its contentions:

(a) That the 135.5 foot strip is no part of the Conkling claim; and

(b) That all the ore taken by the defendant was extracted from the Crescent fissure vein, and that the defendant had the right to this ore by virtue of its extralateral rights in said vein.

(a) BOUNDARIES OF THE CONKLING CLAIM.

It was stipulated at the trial that petitioner is the owner of the Custer No. 2 and the Silver Hill No. 4 claims.

(Tr. of Record, p. 77, title case.)

The patent to the Custer No. 2 and the Silver Hill No. 4 was introduced in evidence and marked Exhibit "Y." The description therein contained shows that there was thereby conveyed to the Belmont Mining Company, defendant's predecessor in interest, all of the 135.5-foot strip, except a very small portion at the northerly end thereof of no consequence in this case, and that no part of the Conkling lying easterly of this strip was so conveyed.

It was clearly established by evidence, free from any real or substantial conflict, that the Conkling claim as originally surveyed and monumented, was but 1364.5 feet in length.

The substance of this evidence is here presented.

Mr. C. P. Brooks, a civil and mining engineer, testifies that the Hope, Nero, Pirate King and Conkling mining

claims are correctly platted upon map, Exhibit "B," from surveys made by him of these claims. (Rec. 78.)

Now, it appears from the field notes of the Hope, Exhibit "N," the Nero, Exhibit "L," the Pirate King, Exhibit "M," and the Conkling, Exhibit "O," that the official survey of the Nero was made by Joseph Gorlinski (long since deceased), U. S. Deputy Mineral Surveyor, on April 1, 1881; the official survey of the Hope was made by the same deputy on the 16th of May, 1882; the official surveys of the Pirate King and Conkling were made by A. Jessen, the former on the 20th of June, 1888, and the latter on the 19th day of November, 1889. According to the field notes of the Hope, the eastern end line of that claim was for a portion of its length coincident with the westerly end line of the Nero. We quote from Exhibit "N":

Commencing at the discovery of the claim, when I set a balsam post . . . marked 'U. S. 260, D. S.' . . . from which a . . . shaft 12 feet deep, bears south 48 deg. 45 min. west 151 feet distant. I run thence south 12 deg. 40 min. east along the eastern end line of this claim, and the western end line of 'Nero' Lot 192."

Mr. R. H. Brown, witness for defendant, testified that he was a mining engineer; that he had made a survey of portions of the Hope claim in the last year; that he found the discovery point called for in the field notes, and also ascertained the course and distance from the discovery point to the shaft mentioned in the field notes, and he found the shaft; that he found the course to be 49 deg. 24 min. west, instead of 48 deg. 45 min. west, as called

for in the field notes, and the distance to be the same as that given in the field notes. (Rec., p. 95.)

According to the field notes of the Pirate King, Exhibit "M," the northwest corner, p. 4, of that claim is identical with the southwest corner, p. 3, of the Nero; and according to the field notes of the Conkling, Exhibit "O," the northwest corner, p. 3, of that claim is identical with the southwest corner, p. 3, of the Pirate King. (Extracts from these exhibits, as found in the record, are in some respects erroneous, hence we have here referred to the exhibits instead of to the record.)

Mr. Brooks testifies that on July 29, 1882, he was engaged in making a survey of the Missouri lode, lot 232; that at that time he found post 2 of the Nero; that on September 2, 1908, he found an old quaking asp in mound of stones, very much rotted, but with marks still visible. These marks were "U. S. 192, P. 3" (Nero), "U. S. 580, P. 4" (Pirate King). There was one post marking both corners. There was also another newer post marked "For lot 580." (Rec. 79-86.) That on August 27, 1901, when he was engaged in making a survey of the 20th Century lode, he found corner No. 4 of the Conkling marked "Post 4, U. S. 689," standing in a mound of stones; that corner No. 4 of the 20th Century, as placed by him, was identical with corner No. 4, or the southwest corner of the Conkling, that in June, 1907, when he was engaged in making a survey of the San Pedro claim, he found that post No. 4 of the Conkling had been knocked out; but he found the old mound of stones in the same place where he had found it before; that a corner of the

San Pedro, as surveyed by him, was practically coincident with the southwest corner, or post 4 of the Conkling—they were a foot or two apart; that in September, 1908, he was at that corner and found there the mound of stones for corner No. 4, but there was no post there; that the San Pedro post was standing where he had originally placed it; that the course and distance of the westerly end line of the Conkling from post 3 to post 4, according to the field notes, was south 21 deg. 8 min. east 600 feet, and that as he has it marked in red on Exhibit "B," it is south 21 deg. 12 min. 30 seconds east 600 feet. (Rec., p. 84.)

In the Conkling field notes the following is found:

"P. 3 of L. 580, Pirate King lode, and north-westerly corner of this claim, both on line; said latter corner being a pine post 4 ft. x 4 in. x 4 in. firmly set; mark same 'U. S. 689 P. 3' for post No. 3, from which a balsam 14 in. in diameter bears south 4 deg. 15 min. east 28 feet distant and a red pine 17 in. in diameter bears north 16 deg. 15 min. east 35 feet distant, both marked 'U. S. 689 P. 3 B. T.'; thence south 21 deg. 9 min. east along southwesterly end line of claim, 600 feet southwesterly corner of claim a pine post 4 ft. x 4 in. x 4 in. firmly set on line, mark same 'U. S. 689 P. 4' for post No. 4." (Exhibit "O.")

In the field notes of the Pirate King (Exhibit "M") it is stated that

"From post No. 3 a balsam pine 14 in. in diameter bears south 4 deg. 15 min. east 28 feet distant, marked 'U. S. 580, P.-3, B. T.'"

And Mr. Brooks testifies that he found a tree so marked; that it was still standing; that his notes show

that it bears south 39 deg. 37 min. west 26.9 feet distant, while the field notes call for south 4 deg. 15 min. east, 28 feet distant; that the position of the tree as he found it is represented on Exhibit "B" by a red triangle with a representation of a little pine tree, and marked "Nail in red balsam;" that it is so marked upon the ground; that if he were to take the course and distance called for in the field notes of the Pirate King, this tree would be as represented (on Exhibit B) by a dotted blue line with a blue circle marked "BT" in a southerly direction from the tree mentioned in the notes; that according to the field notes of the Conkling, from this corner a red pine 17 inches in diameter bears south 16 deg. 16 min. east 35 feet, marked "U. S. 689 P-3 B. T."; that he found a tree standing marked as called for; that he found the course nearly the same as that given in the field notes; that the distance was different; that it was the difference between 22.1 and 35 feet; that taking the bearing tree as found upon the ground and the courses and distances called for in the field notes, it would place the southwest corner of the Pirate King substantially where it was platted by him—within a foot or two. (Rec. 80.)

On cross-examination the witness testified as follows:

"In 1908 I was at the northwest corner of the Conkling as I have it platted. The field notes of the Conkling called for two bearing trees. As I have platted the northwest corner it does not correspond with the course and distance that the field notes called for for either of those bearing trees. If I take the course and distance from one of those bearing trees according to the field notes of the Conkling, the corner post would be about 13 feet southerly from

where I have marked it upon the map. I have marked the place with a pencil circle with a large 'A' pointing to it. If I take the other bearing tree and take the course and distance according to the field notes, it would place the corner northwesterly from where I have put it on the map approximately at the dot in the letter 'I' in the word 'daylight,' which would be about 31 feet northwesterly and less than 20 feet west of the line. It is utterly impossible for any surveyor to locate that corner from those bearing trees with the field notes as to the direction." (Rec. 85.)

All the witness meant by this was that taking the course and distance called for in the field notes to one of these bearing trees, it would establish post 3, the northwest corner of the claim in one position; while the course and distance in the field notes to the other bearing tree would place it in a slightly different position. This is made clear on re-direct where he testifies:

"If I lay my ruler on the west end line of the Conkling as platted on Exhibit B, I find the corners which I have designated in my answers to questions on cross-examination to be $8\frac{1}{2}$ feet and $16\frac{1}{2}$ feet, respectively, westerly of the line, a line projected. Taking the calls in the field notes of the Conkling for those two bearing trees, it would be absolutely impossible to locate the northwest corner of the claim therefrom. The two calls do not check and you have two posts, if you take the tree. Evidently the corner would be between those two trees, but, taking the courses and distances called for in the field notes, you couldn't locate the northwest corner. The maximum error would be 15 feet, as far as the westerly line is concerned. In determining the particular point at which I should have and did plat that corner, I found an old stake in a mound

of stones, marked 'U. S. 580-P. 3.' That stake I was not sure of being the original stake. It did not answer the exact description as to the mound of stones there. It was a Pirate King stake, and alongside of it on the ground a hewn post, marked 'U. S. 689.' This was not standing in the mound. It was this mound which I selected as the particular point for this patent corner. It agreed so closely with my position of the southwest corner that I accepted it." (Rec. 86.)

Mr. J. Fewson Smith, a mining engineer, testified that he made a survey of the Arctic mining claim in November, 1897, that in making that survey he found the northwest corner of the Conkling claim, but has no recollection as to whether he found the southwest corner or not; that he found as designating the northwest corner of the Conkling a post in place; that his notes of survey merely stated that he tied to that corner, but did not describe the post; that he determined the northwest corner of the Conkling to which post No. 3 of the Arctic was tied, by the fact that near the post were standing, agreeing in general to the description and location in corrected relation, two large trees which are marked as bearing trees to that corner; that he had with him the official survey of the Conkling claim and used it in determining that this post was either rightly placed or very close to it; that it had all the marks which the field notes called for. That he found the bearing trees called for in the official notes of the Conkling and made measurements to check the position. (Rec. 86-7.)

On cross-examination he testifies that the original notes of his survey had been destroyed by fire; that in mak-

ing his survey in November, 1897, it is his recollection that there was one post containing the patent number of the northwest corner of the Conkling, and he thinks there were one or two smaller ones in (on) this ground; that the posts were not vertical and for that reason he made some checkings to the bearing trees, and that he satisfied himself that the corner was correct in relation to the pine and balsam called for by the Conkling field notes; that he did not rely upon the posts as fixing the corner; that he felt it had to be checked in some way and so ran the courses and distances to the bearing trees to verify his idea as to the correctness of the post at this point to his satisfaction. (Rec. 87-8.) That posts are frequently obliterated by the elements, and movements of the snows somewhat obliterate posts; that the posts he found standing were protected by underbrush; that in the field notes of his survey of the Arctic claim, it is stated that he did not set a post at either corner No. 1 or corner No. 2 of the claim because it would be exposed to snowslides and could not be made permanent; that on the west end of the Arctic the mountains were swept clear of timber by snowslides and it would be impossible to maintain posts there; that the slope was not only clear of all brush, but very much steeper than the wooded side on which the Conkling stood; that at the west end line of the Conkling, as shown upon the map, the country is wooded; there is underbrush, some timber and a great growth of brush. (Rec. 88-9.)

Mr. Gorlinski testified that he was a mining engineer; that in June, 1902, he made an official survey of the

Custer No. 2 and Silver Hill No. 4 claims; that he did not find post No. 4 of the Conkling but did find post No. 4 of the 20th Century; that at that time he sought to verify the location of the southwest corner of the Conkling by finding another post of that claim; that he went to the northwest corner of the Conkling where he found post No. 3; that it was a post firmly set in the ground, marked "U. S. 580-P 3;" that there was a mound of stones and lying down right by the side of it post marked "U. S. 689-3," and one marked "U. S. 580-P-3" was standing in a moand of stones; that in going from the southwest corner of the Custer to the northwest corner of the Conkling, he determined what course to take from the field notes of the Conkling; that he surveyed a very careful transit line, from which he deduced the direct course and distance; that he found the course and distance of the direct line between "U. S. 689-P. 3" as found by him, and "4-4648, 20th Century," to be south 21 deg. 16 min. 58 sec. east 598.94 feet; that it varied from the line on the map, Exhibit B, 1.6 feet in distance and about 5 minutes in course; that when he was at the northwest corner of the Conkling, he found two bearing trees; that the two trees bore from the stake "U. S. 580-3" (southwest corner of the Pirate King) as follows: "a red pine tree bears north 19 deg. 10 min. east 22 feet;" that he connected with it; that the tree was marked "U. S. 689-P-3, B. T." (Rec. 93.)

That the distance of that tree from the post he found marked "580-P-3" was 22 feet; that the other tree bore north 40 deg. 10 min. west 26.5 feet; that he did not take

the bearing of the tree itself, but took the average of the blaze; that it was marked for the two claims "U. S. 580" and "U. S. 689."

In rebuttal plaintiff called Mr. Wilson, who testified that in October, 1909, he was at the place shown upon Exhibit A as the northwest corner of the Conkling; that he found there an old post lying on the ground, marked "U. S. 689, P-3," also a small piece of a corner stake 2x4 standing up, but rotten in the end, and set in a mound of stones, marked "U. S. 580, P-3;" that the post lying on the ground was within a few feet of the other small 2x4; that the 2x4 post was marked "P-3, 580," was an ordinary 2x4 timber; that it was a little bit short of those dimensions; that upon taking it up he saw that the point of it was rotting in the mound. (Rec. 155-6.)

Mr. Frank Anderson, a witness for plaintiff, who testified that he was at the point marked upon defendant's Exhibit A as the northwest corner of the Conkling, in September, 1908; that he found there a post lying down about 3 feet from where that point is marked; a hewed pine post 5 inches in diameter, 5.4 feet long, and scribed "U. S. 689, P-3;" that he also found a sawed pine stick, 11½ inches (1½!) by 3½ inches, 1¾ feet out of the ground, in a small mound, marked and scribed "U. S. 580, P-3;" that he was familiar with the field notes of the Pirate King and Conkling; that the Conkling field notes called for two bearing trees at corner No. 3; that neither the place where this post was lying on the ground, nor the point where the other post was standing in the mound of stones, corresponded with the distance and di-

rection called for in the Conkling field notes; that the Pirate King field notes called for a bearing tree at that corner, or post No. 3; that this was also one of the bearing trees called for in the Conkling field notes; that the post he found in the ground marked "U. S. P-3, 580," was not at the place where the distance and direction from the bearing trees, as called for by the Pirate King notes, locates the point; that there is no post at the point at which he would arrive by starting from the bearing tree marked with the Pirate King mark and taking a course and distance from that bearing tree, as called for in the Pirate King field notes. (Rec. 156.)

On cross-examination he testified that he found two bearing trees marked in the way described in the field notes of the Conkling; that taking the balsam tree which is marked "U. S. 689-P-3" and "U. S. 580, P-3," and running out to the position of the post from the call, would make its position about $20\frac{1}{2}$ feet to the westerly; that P-3 as claimed by the defendant he has indicated with a pencil mark in a circle; that the figures "2778" are just to the northwest of corner No. 3 of the Conkling as marked on that Exhibit A; that drawing a line through that parallel to the west end line, it would place it west of where it is on Exhibit A, 17 feet; that in taking the pine tree, according to the calls in the field notes, and drawing a line through that parallel to the end line of the Conkling it would fall about 3 feet—that is, as near as he could measure it, to the west of the end line. (Rec. 156-157.)

Throughout the trial there was not a suggestion that

either of these bearing trees testified to by the witnesses as still standing with the marking or scribing thereon, corresponding exactly with that called for in the field notes of the Conkling, were not the trees called for in these notes and so marked or scribed by Mr. Jessen at the time he made his survey of this claim. Now, if these are the trees called for in the field notes, it is thereby alone conclusively established that corners No. 3 and No. 4, as monumented by Mr. Jessen at the time of his official survey, must have been substantially as claimed by appellee.

(The circle on map, Exhibit B, beneath which is written "Post 4 feet by 4 inches by 3 inches," and scribed "corner 3 Conkling newly set" is intended to indicate a post found upon the ground there which was newly set in December, 1910. The other circle beneath which is written "Sawed pine 4 inches by 4 inches, 2½ feet high, scribed corner 4 Conkling, apparently recently set," also indicates the position of a post recently set. These would be the northwest and southwest corners of the Conkling, if the claims were extended 135½ feet further to the west than the original monuments.) (See Brooks, page 95.)

No one claims that in the vicinity of either of the points indicated by these circles there was any bearing tree or mound of stones or anything whatever to indicate that there had been a post there.

It is shown clearly by the testimony of Mr. Wiley, and not questioned, that the blazes and the scribing upon these trees must have been done at least twenty years

prior to the time when he first observed them, to-wit, in October, 1911. (Rec. 90.)

We submit that the decision of the lower court that the Conkling claim, as monumented in the official survey thereof, was only 1364.5 feet in length, finds ample support in the evidence.

**THE DECISION OF THE COURT OF APPEALS WITH RESPECT TO
THE BOUNDARIES OF THE CONKLING CLAIM.**

The Court of Appeals holds:

1. That the Conkling patent does not call for a post or monument at either the northwest or southwest corner of the claim, and that therefore the evidence of the defendant establishing the positions of these two corners of the Conkling claim as it was originally surveyed for patent, is immaterial; that the calls of the Conkling patent for a distance of 1500 feet from the northeast corner to the northwest corner, 1500 feet from the southwest corner to the southeast corner, are conclusive of the length of the claim, and cannot be controlled by the position of the monuments erected in the official survey to mark the northwest and southwest corners, however satisfactorily the original positions of these corners may have been established by the evidence.

2. Speaking with reference to the evidence received by the trial court for the purpose of fixing the original positions of the northwest and southwest corner posts of the Conkling claim, the Court of Appeals says that the defendant, relying upon the monuments on the ground to control the length of the Conkling claim according to

the calls of the patent, produced evidence which "consisted of the field notes of the survey of the claim, which were made on November 1, 1889, by the United States Surveyor, which recited that a pine post 4 feet by 4 inches by 4 inches was set at its northwesterly corner and marked "U. S. 689, P-3," and another at the southwesterly corner of the claim marked "U. S. 689, P-4," that these posts were 1500 feet distant from the easterly end line of the claim, the location of which is admitted, and that the area of the claim was 20.45 acres; and the testimony of witnesses that they found these stakes years after the survey 1364.5 feet distant from the easterly line of the claim.

That in addition to this testimony a large number of plats and field notes of other claims in the vicinity of the Conkling claim and some other evidence was introduced, but the testimony that these stakes were found by two or three surveyors, sometimes lying on the ground and sometimes standing in a mound of stones about 1364.5 feet distant from the easterly line of the claim, is the most substantial and persuasive evidence that they were originally placed by the surveyor at about that distance from the easterly line.

The Court of Appeals proceeds:

"The court is of the opinion that if all the evidence offered had been competent it would have been insufficient to overcome the strong presumption that the plain description in the patent was right, insufficient to overcome the facts that the plat showed the claim to be 1500 feet in length and 600 feet in

width, that the Surveyor General certified that the plat was correct, that the field notes recited that the claim was 1500 feet in length and 600 feet in width, that the field notes, the plat and the patent each declare that the area claimed was 20.45 acres, that this is the area of a tract 1500 feet in length and 600 feet in width, while the area of a tract 1364.5 feet in length and 600 feet in width is nearly 2 acres less, and the persuasive presumption that the plain description in the patent expressed the actual intention of the parties to it. These considerations have left no doubt that the court below made a mistake in its finding that the patent did not convey the westerly 135.5 feet of the land described in it and have satisfied our minds that it conveyed, and the plaintiff now owns, the tract 1500 feet in length and 600 feet in width so clearly described in it.

Nor has this conclusion been reached without a deliberate consideration of the general rule that in cases of conflict monuments prevail over courses and distances, and of the amendment of 1904 to Section 2327 of the Revised Statutes (10 Stat. Ann. 235), which provides that:

‘Where patents have issued for mineral lands, those lands only shall be segregated and shall be deemed to be patented which are bounded by the lines actually marked, defined, and established upon the ground by the monuments of the official survey, upon which the patent grant is based. * * * The said monuments shall at all times constitute the highest authority as to what land is patented, and in case of any conflict between the said monuments of such patented claims and the descriptions of said claims in the patents issued therefor the monuments on the ground shall govern.’

But the general rule is not without exception. It is but one of many rules for construing and applying descriptions in conveyances to the land described. The sole object of this and of all other such rules is to aid in ascertaining the land which the parties in-

tended to convey, and where, as in the case at bar, the description in the patent is unambiguous, and the intent of the parties is clear beyond doubt to convey the tract so described, that intent must prevail over this or any other rule of construction or application, the only purpose of which is to aid in ascertaining such intent.

And there are many reasons why the amendment to the statute which has been quoted ought not to be permitted to revoke or modify the grant of a patent which the United States unquestionably intended to make and did make, and which the patentee applied for, earned and received years before that amendment was enacted. The amendment was passed and approved 12 years after the United States had conveyed this land to its patentee, and it could not by its mere legislative fiat revoke that grant and take from him, or from subsequent purchasers of it from him, the land it had conveyed 12 years earlier, or any part of it. In the second place there is in this case no conflict between the courses and distances and the monuments named in the patent, and parties cannot be and ought not to be permitted to import into a clear and perfect description in the patent by parol evidence 19 years after its issue monuments not mentioned therein to create a conflict between those monuments and the courses, distances and clear description and area stated in the patent, and then by the aid of the amendment of 1904 to destroy or diminish by means of these imported monuments, the grant. It cannot have been the intention of Congress that this amendment should apply to a prior grant under such circumstances as this case presents. And finally the proof that the westerly posts of the official survey upon which this patent was granted were originally set only 1364.5 feet distant from the easterly line of the claim is not of that certain and satisfactory character which would warrant a court in avoiding so many years after the issue of the patent, the grant which the

United States clearly made. The defendants cannot deprive the plaintiff of the land described in his patent by means of the proof of the finding of these old posts which was introduced in this case."

We respectfully insist:

(A) That the Court of Appeals was in error in holding that the language of the Conkling patent is such that the calls for 1500 feet *forbid the reception of any evidence*, even of the Conkling field notes, to show the actual positions of posts Nos. 3 and 4, as erected upon the ground at the time of the patent survey.

(B) That the finding of the trial judge that the original position of the west end line of the Conkling claim as marked by posts 3 and 4 thereof was 1364.5 feet distant from the easterly end line, was not only well warranted but imperatively demanded by the evidence.

Your petitioner contends:

1. That the land office is without jurisdiction to issue a patent which, by its terms, embraces a greater area than is actually marked out upon the ground by the surveyor making the patent survey at the instance of the applicant for patent.

2. That the language of the Conkling patent must be so interpreted if possible as to confine the ground within the boundaries erected at the time of the patent survey to mark the corners of the claim.

3. That considered in the light of the law requiring monuments to be erected to mark the corners of mining claims when surveyed for patent, the calls in the Conkling patent, "thence second course south 60 deg. 45 min. west 1500 feet to *corner No. 3*; thence third course south 21

deg. 9 min. east 600 feet to *corner No. 4;*" are in fact calls for monuments.

I.

U. S. Revised Statutes, Section 2325, provides that:

"A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person * * * may file in the proper Land Office an application for patent, under oath, * * * together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States Surveyor General, showing *accurately* the boundaries of the claim or claims which shall be distinctly marked by monuments on the ground. * * *"

And the rules and regulations prescribed by the Commissioner of the General Land Office to govern United States deputy mineral surveyors, in force at the time the Conkling claim was surveyed for patent, provided, among other things, as follows:

"(Fourth paragraph.) Deputies in making official surveys of mining claims * * * will mark all corners with appropriately inscribed rocks in place, trees not less than 4 inches in diameter in place; stones at least 2 feet long, planted on end, one foot in the ground, or with posts 4 inches or more in diameter, planted (if ground will admit of it) 2 feet in the ground, and protruding not less than 2 nor more than 4 feet above ground, both planted stones and posts to be protected with mound of stones or earth in addition to the planting."

"(Fifth paragraph.) Corner monuments, whether rocks or trees in place, or planted stones or posts, will be inscribed on the side found or set facing the claim being surveyed, thus: 'No. 1, U. S. 37,' 'No. 2,

U. S. 37,' etc., the inscription to be cut out three-sixteenths of an inch deep in the stone or wood."

"(Sixth paragraph.) The position of all corner marks of whatever description is to be evidenced, wherever practicable, by marking the courses and distances to two or more adjacent trees, prominent rocks, or other permanent and prominent objects, as shafts, tunnels, houses, * * * in opposite directions, as nearly as may be * * * .

"The letters 'B T' are also to be inscribed as provided, upon a smaller blaze directly under the large one and as near the ground as practicable."

"(Seventh paragraph.) All the monuments and witness objects with their inscriptions are to be fully described in their order in the field notes of the survey to which they belong."

"(Ninth paragraph.) Deputies will make return of all official surveys, within reasonable time * * * and this office will not consider any return of survey made, without the same embraces the following matter, viz.:

"(a) Complete field notes, showing the boundaries of the claim or claims * * * together with the certificate of the deputy making the survey in question, that the survey reported by him embraces the *identical ground described in the Notice of Location* and found within the stakes upon the ground * * * .

"(d) The affidavit of two disinterested, competent witnesses, that the survey ordered to be made embraces the identical ground described in the *Notice of Location*, according to which the deputy was ordered to survey, and hitherto claimed thereunder."

"(Tenth paragraph.) The location posts of claims (original) where they are sufficiently identified, must in all cases be connected by course and dis-

tance with the posts established by the survey, and such connections set forth in the field notes."

(See Exhibit TT-1.)

These rules and regulations bear date March 31, 1882. That they were adopted and declared to be in force by the Land Department is not denied.

Lawful rules and regulations prescribed by the several departments of the Government, have in a proper sense, the force of law.

United States vs. Eaton, 144 U. S. 677, 688;
Wilkins vs. United States, 96 Fed. 837, 841;
Brady vs. United States, 98 Fed. 238, 239;
Files vs. Davis, 118 Fed. 465, 468;
Caha vs. United States, 152 U. S. 211, 218-220.

In *Waskey vs. Hammer*, 223 U. S. 85, this Court, at page 92, says:

"Mineral surveyors are appointed by the surveyor general under Rev. Stat. Sec. 2334, and their field of action is confined to the surveying of mining claims
 • • • and their work must be done in conformity to regulations prescribed by that officer (Commissioner of the General Land Office). • • • Within the limits of their authority they act in the stead of the surveyor general and under his direction, and in that sense are his deputies. The work which they do is the work of the government, and the surveys which they make are its surveys. The right performance of their duties is of real concern, not merely to those at whose solicitation they act, but also to the owners of adjacent and conflicting claims and to the Government."

Now, accompanying the field notes of the Conkling, there is found the following certificate:

"I hereby certify that the survey of the Conkling lode mining claim in Uinta Mining District, Summit County, Utah,—of which the foregoing are the true and original field notes—was made strictly in accordance with the location notice and boundary stakes so as to embrace the identical ground located as is shown by the accompanying affidavits of Geo. Jacobsen and Nils Sundberg, two disinterested witnesses.

A. JESSEN,
U. S. Dep. Min. Surveyor."

Apologizing for the repetition, it is well that it should here be borne in mind that, according to the allegations found in the amended bill of complaint and the admission thereof found in the amended answer thereto, the greater part of this 135.5-foot strip at the time the Conkling mining claim was surveyed and patent applied for, was covered by prior valid locations, namely, the Custer No. 2 and the Silver Hill No. 4, upon which a patent was afterwards issued embracing said 135.5-foot strip, and which claims were afterwards acquired by and are admitted to be the property of your petitioner.

It is stated in the opinion of the learned Circuit Court of Appeals:

"The applicant for the land and the patent in this case had the right under the Acts of Congress to locate and purchase from the United States a mining claim 1500 feet long and 600 feet wide, and it is conceded that it claimed and applied for a patent to a tract of these dimensions."
(230 Fed. Rep., page 558.)

Petitioner denies that the applicant for patent to the Conkling mining claim had any right to seek a patent for any part of the 135.5-foot strip, since it is an admitted fact in the case that this 135.5-foot strip was already included within two valid locations antedating the location of the Conkling claim. The question involved is whether under these circumstances, assuming that the applicant for patent to the Conkling claim did by its paper application seek a patent for a claim 1500 feet in length, did the Land Department have jurisdiction to grant the patent for a claim of that length and thereby include therein the 135.5-foot strip? We concede that the Land Department had jurisdiction to make such a grant, provided, but only provided, that the monuments erected to mark the boundaries of the Conkling claim, when the same was surveyed for patent, included the 135.5-foot strip.

We insist that if the monuments erected to mark the boundaries of the patent survey left the 135.5-foot strip outside the boundaries of the Conkling claim as thus marked on the ground, that when the Land Department came to issue the patent it was without jurisdiction to include within the terms thereof any portion of the 135.5-foot strip; and that being without jurisdiction to include said strip in the Conkling patent the language of the patent should be so construed if possible as to exclude from the terms of the Conkling patent any part of said 135.5-foot strip, and that if it may not be thus construed the Conkling patent is void in so far as by its terms it includes the 135.5 foot strip, because said 135.5 foot strip was then

not the property of the government, but was the property of the owner of the Custer No. 2 and the Silver Hill No. 4, prior subsisting valid locations.

If the legal proposition here asserted is sound, it necessarily follows that the petitioner was entitled to show that the Conkling lode as surveyed for patent and then marked out upon the ground by the official monuments did not include the 135.5 foot strip.

I.

The complainant's rights in the 135.5-foot strip, as set forth in the bill, as we construe it, rest upon its claim that if the lines of the Conkling claim be run out, according to the calls of the patent, the strip in question will be included. *The complainant confesses its inability to meet the contention that the 135.5-foot strip is not a part of the Conkling claim, as that claim was surveyed for patent and marked upon the ground, or as that claim was originally located.* We take it that the allegation in the bill (contained in Paragraph XIV of the same), to the effect that the Custer No. 2 and Silver Hill No. 4 were locations which antedated the location of the Conkling claim, and included the whole of the 135.5-foot strip now in controversy, is equivalent to an admission that the Conkling claim, as originally located and marked upon the ground by the locator thereof, included no portion of the 135.5-foot strip.

The allegations made by the complainant, that it is entitled to be treated as a tenant in common with the defendant company as to the three-fourths interest in the

strip in controversy because of the manner in which it is averred the defendant's predecessors in interest acquired the Custer No. 2 and Silver Hill No. 4 claims, including the 135.5-foot strip, it did not attempt to support upon the trial.

The complainant, upon the trial, so far as title to the 135.5-foot strip is concerned, rested solely upon the contention that the calls in the Conkling patent included the strip in controversy, and that the evidence offered by petitioner showing that the monuments upon the ground which marked the exterior boundaries of the Conkling claim, and proved it to be in fact only 1364.5 feet in length (and therefore not to include any part of the 135.5-foot strip) was wholly irrelevant and immaterial. This contention the learned court of appeals adopted.

From the pleadings in the case it is seen that the 135.5-foot strip was admittedly part and parcel of the Custer No. 2 and Silver Hill No. 4 lode mining claims, and that these claims were located prior to the date of the location of the Conkling claim; that patents for these claims were finally granted by the United States of America to the predecessors in interest of the defendant company, and that the claims are now owned by the defendant. This is again admitted by stipulation appearing on page 77 of the transcript. It is true that it is pleaded by the complainant that the Conkling claim was patented prior to the date of the issuance of the patent for the "Custer No. 2" and the "Silver Hill No. 4," and that the description of the Conkling claim, *according to the calls of the patent*, includes the 135.5-foot strip. The defendant, in answer-

ing this contention, stated that the Conkling claim, as marked on the ground, included no part of the 135.5-foot strip. This contention, it proved, practically without contradiction, and the complainant was, as it averred in its bill it would be, "helpless" to meet such contention.

If the usual rule were to prevail, then it will appear by the complainant's own bill, and the stipulation just referred to, that the 135.5-foot strip is the property of the defendant. This follows from the averments of the bill that the 135.5-foot strip is territory included in the Custer No. 2 and Silver Hill No. 4 claims, and that those claims were located prior to the location of the Conkling claim, and finally passed to patent to defendant's grantor, and that the defendant is now the owner of said claims. In the absence of the presumption of a waiver or forfeiture of said 135.5-foot strip by the proprietors of the Custer No. 2 and the Silver Hill No. 4 claims, the patent to the Conkling claim, from the allegations of the bill itself, appears to be void as to said strip. It is not claimed in the bill that the 135.5-foot strip was forfeited to the applicant for patent to the Conkling claim by the failure of the proprietors of said two claims to file an adverse claim. This is not explicitly claimed, but assuming that it is to be presumed that the owners of the Custer No. 2 and Silver Hill No. 4 failed to adverse the Conkling application, our contention is, that the averments of the *answer* that the Conkling claim, as originally located, and as officially surveyed for patent, did not conflict with the Custer No. 2 or Silver Hill No. 4 claims, so far as to include any portion of said 135.5-foot strip now in con-

troversy, are equivalent to a plea that the land office did not have jurisdiction to convey to the patentee in the Conkling patent any portion of said 135.5-foot strip. It is true the answer does not, in explicit language, aver that the land office did not have jurisdiction to convey any part of this 135.5-foot strip. Such an allegation would be but a legal conclusion. The answer does better, and sets up the *fact* that the Conkling claim, as marked upon the ground, when officially surveyed for patent, included no portion of said 135.5-foot strip, and, as it is an admitted fact, that said 135.5-foot strip then did not belong to the Government of the United States, but to the proprietors of the Custer No. 2 and the Silver Hill No. 4 mining claims, it necessarily follows that said strip still belongs to the proprietors of said two last named claims, unless we assume that the land department intended by the Conkling patent to convey said 135.5-foot strip to the patentee named therein; and had jurisdiction to make such conveyance. If the allegations of the answer be true, the land department neither had such intention, nor possessed such jurisdiction.

At the time of the application for patent for the Conkling, the 135.5-foot strip, being a part of the Custer No. 2 and Silver Hill No. 4 lode mining claims, which claims it is admitted afterwards passed to patent, it is at once apparent that the land office could not *rightfully* grant any portion of said 135.5-foot strip to any person, except the owner of said two claims.

Mining claims are not open to location until the rights of the former locator have come to an end. So long as

the locator complies with the statutory requirements, he is entitled to the exclusive possession and enjoyment of his location. A valid location of a mining claim operates as effectually as a patent from the Government to invest the locator with the right of possession and the right to the minerals found therein. No person can avail himself of the mineral in the public lands which another has discovered, until the discoverer has in law abandoned his claim and left the property open for another to take it up, or has waived his rights to it by failing to file an adverse claim to a legal application by another to purchase it. The rights of the locator are valuable property rights, which the law means to protect. The land department of the Government may not, except it be done in the way authorized by law, deprive the discoverer and locator of his location, by conveying it by patent to another.

After a locator has done all that is necessary under the law for the acquisition of an exclusive right to the possession and enjoyment of the ground, the claims are thenceforth his property. He needs only a patent of the United States to render his title perfect, and until the patent issues, the Government holds the title in trust for him. The ground itself is not, after a location, open to sale or conveyance by the land department to any one but the locator or his successors in interest.

Gillis v. Downey, 85 Fed. 483;

Belk v. Meagher, 104 U. S. 284;

Noyes v. Mantle, 127 U. S. 351.

Of course we concede that the property of one man, however valuable, may, by a judicial tribunal, and per-

haps by other tribunals, be taken and given to another who has no real right to it; but this we insist can only be done by due process of law. Conveyance by the land department, or by the highest court in the land, of one man's property to another is void, however solemn the form in which it may be made, whether by judgment, or patent, unless the tribunal or officer rendering the judgment, or issuing the patent, have jurisdiction to pass or transfer the title. So, under the mining statutes, the land department may transfer by patent, to one who has no right to it, a valid location which belongs to another person. But this can only be done where such proceedings are had that the land department acquires jurisdiction of the claim. //

If the allegations of the defendant's answer in this case are true, the land department did not acquire jurisdiction of the 135.5-foot strip, and its conveyance of the same (if the Conkling patent be deemed to be a conveyance of it) is a nullity.

The question arises, how is jurisdiction of a valid mining claim located and owned by one person, acquired by the land office so as to make valid its conveyance of the same to another?

Our contention is that the land department cannot acquire jurisdiction to convey to B a valid location which belongs to A, unless it first *seizes* or takes possession of A's claim, or some part of it, and then gives notice to the world in the manner prescribed by law that the property is claimed, and a patent is sought for it by B.

The property is seized and taken into possession of the

land department by surveying it, putting up monuments to mark its boundaries, and posting upon it a notice that it has been thus seized and is to be conveyed to him who is seeking to purchase it, unless persons who have an adverse claim to it shall, within the time allowed by law, make their claims known.

One who applies to the Surveyor-General for an official survey of a mining claim, with a view to securing a patent for it, and has that survey made and the boundaries of the claim marked, files an application for a patent for the claim and posts the required notice on it, initiates a controversy against all persons who claim any interest adverse to the applicant in the ground thus surveyed and claimed. If no adverse claim is filed within the time required by law, a patent may properly issue to the applicant. That is to say, the *thing* which has been seized and of which the land office has jurisdiction, may be conveyed to the applicant for patent; and if this area of ground so segregated from the public domain and so conveyed, includes land which belongs to others, and the proceedings have been fair and regular, such others are without redress. The adverse claims of others are declared by the statute to be waived. All this we concede; but we insist that the land office has no jurisdiction to convey anything except what it *has seized and taken possession of*; and it has seized and taken possession of nothing except that area of ground which *has been segregated from the public domain by being surveyed and having its boundaries officially marked and a notice posted on it*. If, therefore, after the period of publication of notice has

expired, and no one has come with an adverse claim, the land department enters a judgment or issues a patent, the effect of which upon its face is to grant to the applicant for patent, not only what has thus been officially surveyed and marked out upon the ground, but also a portion of another subsisting and valid mineral location which is the property of a neighbor, *and which was not included in the land surveyed for patent*, and upon which no notice was posted, then the determination, judgment or patent is, so far as it includes the neighbor's land, as null and void as if the land department had conveyed to the person named in the patent, the land of the neighbor without the formality of any survey, any application, or any notice whatever.

It is settled law, of course, that the proceeding by which patent is sought for a mining location, is in rem.

3 *Lindley on Mines*, Sec. 713.

It is a proceeding in rem because the thing sought to be purchased by the applicant for patent is required to be, if we may use that expression, carved out and segregated from everything else of a like nature. Its boundaries are plainly marked, a notice is posted on the res, and a notice is posted in the land office in the district where the res is situated, whereby all persons are advised that a patent and title to the res is sought by some particular person, and that all persons who have any adverse claims to it must, within a limited time, come forward and assert them. This is truly a proceeding in rem, but it is a proceeding only with respect to the res which is thus segre-

gated and carved out upon the face of the earth, and upon which the notice is posted, so that all men may know what the res is that is claimed by the applicant, and as to which, after a limited time, no one will be permitted to assert a hostile claim. Of this res the land department has jurisdiction. But it has not by such proceeding, jurisdiction of any neighboring claim. When it comes to convey this res, therefore, its conveyance is clearly void, so far as it includes any land not a part of the res, and which is the property of others by virtue of prior valid locations.

We therefore insist that all evidence which tended legitimately to show that the boundaries of the Conkling claim as surveyed for patent did not include any portion of the 135.5-foot strip (part of the Custer No. 2 and Silver Hill No. 4 claims) was relevant, because such evidence showed, if true, that the land office had no jurisdiction to convey said strip.

This Honorable Court has clearly stated what is necessary to be done to secure jurisdiction of the res in proceedings in rem.

Cooper v. Reynolds is a case of ejectment. Judgment was given in favor of the plaintiff, and the defendant sued out a writ of error. It was admitted that the plaintiff had title to the land in controversy, unless it had been divested by certain judicial proceedings under which the defendant asserted title. The proceeding under which Cooper claimed title was an action in which a writ of attachment was issued and was levied upon the land in controversy. The case in which the writ of attachment was issued proceeded to judgment, and by the judgment

the land attached was ordered to be sold. It was sold to Cooper. No process was ever served on Reynolds, nor was there any appearance for him at any stage of the proceedings. The court says:

“It is necessary, therefore, in the present case, to inquire, whether the errors alleged affect the jurisdiction of the court.

It is as easy to give a general and comprehensive definition of the word ‘jurisdiction’ as it is difficult to determine, in special cases, the precise conditions on which the right to exercise it depends. This right has reference to the power of the court over the parties, over the subject matter, over the res or property in contest, and to the authority of the court to render the judgment or decree which it assumes to make.

By jurisdiction over the subject matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred.

Jurisdiction of the person is obtained by the service of process or by the voluntary appearance of the party in the progress of the cause.

Jurisdiction of the res is obtained by a seizure under process of the court, whereby it is held to abide such order as the court may make concerning it. The power to render the decree or judgment which the court may undertake in the particular cause, depends upon the nature and extent of the authority vested in it by law in regard to the subject matter of the cause.

It is to be observed that in reference to jurisdiction of the person, the statutes of the States have provided for several kinds of service of original process short of actual service on the party to be brought before the court, and the nature and effect of this

service, and the purpose which it answers depend altogether upon the effect given to it by the statute. So, also, while the general rule in regard to jurisdiction in rem requires the actual seizure and possession of the res by the officer of the court, such jurisdiction may be acquired by acts which are of equivalent import, and which stand for and represent the dominion of the court over the thing, and, in effect, subject it to the control of the court. Among this latter class is the levy of a writ of attachment or seizure of real estate, which being incapable of removal, and lying within the territorial jurisdiction of the court, is for all practical purposes brought under the jurisdiction of the court by the officer's levy of the writ and return of that fact to the court. So the writ of garnishment or attachment, or other form of service, on a party holding a fund which becomes the subject of litigation brings that fund under the jurisdiction of the court, though the money may remain in the actual custody of one not an officer of the court. • • • Now, in this class of cases on what does the jurisdiction of the court depend? *It seems to us that the seizure of the property, or that which, in this case, is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it, unquestionably, is in proceedings purely in rem.*"

Cooper v. Reynolds, 10 Wall. 308-321;

Rose v. Himely, 4 Cranch. 241.

It is said in this latter case by Marshall, Chief Justice:

"Proceedings for forfeiture are always proceedings in rem; and to make them valid it is always necessary that the court should have possession of the thing. Possession is the foundation of all its proceedings. • • • From the nature of things the res or thing against which the suit is instituted ought to be within the power and jurisdiction of the court before which it is tried. • • • In this country

no court has jurisdiction in rem unless the thing be within its jurisdiction."

The Congress of the United States recognized in the enactment of Sections 2325 and 2326 of the Revised Statutes of the United States, that the surface boundaries of mining claims located by virtue of the provisions of Section 2319, might frequently be found to conflict one with another. Such conflicts, as matter of fact, are of frequent occurrence, as will be disclosed by an inspection of the map of any mining district in the country. Where the claims are in conflict, of course, the conflict area is part of the senior location. A junior locator acquires no right as against the senior locator, by so laying his claim as to create a conflict with the senior location. Under the provisions of Sections 2325 and 2326, however, the senior locator, the true owner of the conflict area, may lose it to the junior locator, if the latter first makes application for patent, and, *proceeding according to the provisions of said sections*, embraces said conflict area in his application for patent and in his official survey.

The proceedings upon an application for patent are designed to quiet the title of the patentee to all areas of ground in conflict with his claim or location. Any area in conflict with the ground sought to be patented is, where the law is complied with, *actually seized and brought under the power and control of the land department of the Government, and notice of such seizure is posted upon the thing seized*. Thereby all persons who claim any interest in the thing are presumed to have notice that it is claimed adversely, and that their title (if any) will be

forfeited unless it shall be seasonably asserted. All this is due process of law. If one who owns a portion of the claim applied for by virtue of a senior location, loses it after such proceedings by his failure to assert his title, he may be very justly deemed to have waived his title, as the law itself declares.

The importance of the seizure of the property by the tribunal in which a suit against it is instituted is indicated by this court in the following language:

"The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon said seizure, for its condemnation and sale."

Pennoyer v. Neff, 95 U. S. 730.

This is the principle of law, we take it, which Congress had in mind in providing for the proceedings upon an application for patent and the method whereby the applicant for patent might quiet his title to any areas in conflict with neighboring claims. The areas in conflict, when the law is followed, are plainly seized and taken into the power and control of the land department.

Section 2324 provides that a mining claim "must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims shall contain . . . such a description of the claim . . . by reference to some natural object or permanent monument, as will identify the claim."

Section 2325 provides that any person who has *thus*

located a piece of land may file in the proper land office, an application for a patent, showing his compliance with the law—(among other things, his location and marking of his claim, made upon the ground, as provided in Section 2324),—together with a plat and field notes of the claim, made under the direction of the surveyor-general, showing accurately the boundaries of the claim, which shall be distinctly marked by monuments on the ground. The applicant is required to post a copy of such plat, together with a notice of such application for patent, in a conspicuous place on the land embraced in such plat. The register of the land office, upon the filing of such application, plat, field notes of the survey, etc., shall publish a notice that such application has been made, for the period of sixty days, in a newspaper published nearest to such claim. At the expiration of sixty days of publication the claimant must show that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed, it shall be assumed that no adverse claim exists.

By Section 2326 it is provided that if an adverse claim shall be filed during the period of publication it shall show the nature, boundaries and extent of such adverse claim, and thereupon all proceedings * * * shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. Suit is required to be brought by the adverse claimant. After judgment in such suit shall have been rendered, the party entitled to the possession

of the claim, *or any portion thereof*, may have a patent for the claim, *or such portion thereof*, as he shall appear, from the decision of the court, to rightfully possess. If it appears from the decision of the court that several parties are entitled to *separate and different portions of the claim*, each party may pay for *his portion* of the claim, • • • and patents shall issue to the several parties according to their respective rights.

It is perfectly evident from the foregoing provisions of the mining law that the adverse claim which is deemed to have been waived by failure to assert it, *is an adverse claim to some area in conflict with the location as surveyed and marked upon the ground*. In other words, it must be an adverse claim to some portion of the thing which the land officers of the Government have taken within their power and control: in other words, *under their jurisdiction*. If the claim, as originally located and as surveyed for patent, does not include any portion of any other claim, *then no other claim is within the jurisdiction of the land department of the government*. There is then no proceeding against any portion of any claim, except the claim for which patent is sought. The notice which is posted on the claim surveyed is obviously not posted on any claim, and has no relation to any claim, not in conflict with the claim for which patent is sought.

If, as said by this court in *Cooper v. Reynolds*, *supra*, "the seizure of the property, or that which is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction," then in proceedings to acquire patent to a mining claim, the one essential

thing to the jurisdiction of the land office is the survey and marking of the boundaries of the claim sought to be purchased, and a posting of the notice on it.

The proceedings provided for by law upon an application for patent do not touch or affect, and cannot be made to touch or affect neighboring claims not in conflict with the claim sought to be patented, as the same is surveyed for patent and marked on the ground.

This court, in speaking of due process of law and condemning as insufficient, and not amounting to due process of law, a brief notice of five days to a non-resident, to appear or suffer judgment by default, said: "That a man is entitled to some notice before he can be deprived of his liberty or property, is an axiom of law to which no citation of authority would give additional weight. • •

• It is manifest that the requirement of due notice would be of no value whatever unless such notice were reasonable and adequate for the purpose."

Roller v. Holley, 176 U. S. 398.

The application for patent to the Conkling claim is not in evidence in this case, nor is the plat, but it is required by Section 2325 that with an application for a patent for a mining claim, there must be filed a plat and field notes of the claim, made by or under the direction of the United States Surveyor-General, showing accurately the boundaries of the claim, as the same is marked by monuments on the ground, and a copy of such plat, together with a notice of such application for a patent is required to be posted on the claim. The application for patent for the Conkling claim, and the plat thereof were,

of course, to be construed with reference to the claim as marked and monumented upon the ground, and if the application for patent, and the plat, described the claim as 1500 feet in length, the application and the plat were yet controlled by the monuments of the claim found upon the ground and to which they referred. Moreover, the owners of the 135.5-foot strip were not required to take notice of the application for patent, or of the plat. The posted notice and plat are constructive notice to him upon whose land they are posted; but to no others. It is the posting of the notice and the plat upon a man's claim which charges him with constructive notice that his ground is claimed by another. If the notice of the application and the plat are not posted on a man's land, they are not presumed to come to his knowledge, and the contents of the notice and of the plat are immaterial.

We do not mean, of course, that the application and the plat must be posted upon the area in conflict. Posted anywhere within the four corners of the claim for which patent is sought, as the claim as monumented and marked on the ground, is a posting on all the land included within the monuments, including, of course, any area in conflict with any other claim.

We insist that, as the plat and notice required to be posted on the claim must have been posted within the four corners of the Conkling claim, as marked on the ground, these papers were not posted on any part of the ground in controversy, and the owners of such ground, therefore, had not constructive notice of such papers; and cannot, therefore, be charged with knowledge of their

contents. But if they had actually seen and read them what would they have then discovered, that admonished them that an application for patent was being made for the ground in controversy? If they had read all the papers in the case, they would have learned from those papers only that a patent for the Conkling claim, *which was before their very eyes marked out upon the ground,* was sought; and that said Conkling claim was supposed to be 1500 feet in length. But the Conkling claim is a physical thing, which was literally fenced off with plain and unmistakable boundaries, and as thus fenced off included no part of the ground in controversy. The length of the Conkling claim was then of no importance to the owners of adjoining ground. If the owners of the ground in controversy had measured the Conkling claim, from east to west, they would have found it to be 1364.5 feet in length, as by the evidence in this case it is proved to be, and this actual length upon the ground would have been controlling as to the ground which it embraced, and it could not be made to embrace more by the mistaken assertion that it was 1500 feet in length. There is nothing better known in the mining country among the miners than that the claim as marked out upon the ground controls the courses and distances named in the location notice, or in any application for patent. It would astonish a common miner to be told that after he had located a mining claim, and marked its boundaries, that if another person should locate another claim, near by, and mark its boundaries so that it did not conflict with the first location, and should thereafter apply for a patent for such

junior location, and have the boundaries thereof officially surveyed and monumented, so that still it did not conflict with the senior location, that he, the first locator, might be deprived of his location, or a part of it, by the act of the land officers of the Government in issuing a patent to the junior locator which included his prior location, or any part of it. He would naturally protest that such a proposition was contrary to the first principles of common justice. To say that the owner of a neighboring claim has notice that a patent for part of his claim is applied for, where no part of it is included within or conflicts with an adjoining claim, for which patent is sought, on the ground that the application for patent or plat, construed without reference to the monuments upon the ground, would take in a part of his property, is to say that a man may be deprived of his property by an application for it by another, when that application not only never comes to his notice actually or constructively, but, by the very course of the proceedings, he is led to assume that no claim against his property has been made. If owners of neighboring claims may not rest secure against having their claims being included in patents to mining claims with which their claims are not and never have been in conflict, as shown by the monuments upon the ground and by the official surveys, then the official marking of a claim upon the ground is a sham and deceptive proceeding whereby owners of mining claims may be lulled into a false security and be deprived of their property without notice or opportunity to be heard in defense of their rights.

The invalidity of the Conkling patent, as to the 135.5-foot strip, was asserted as soon as it could be asserted. The only claim, so far as appears by the record, ever made to the 135.5-foot strip by any person other than the owners of the Custer No. 2 and Silver Hill No. 4, was made by the plaintiff when it brought this bill in equity to quiet title to said strip and to compel this defendant to account for ores mined therefrom by it and its predecessors in interest, the Kearns-Keith Mining Company.

Our contention is that if it is true that the land department of the Government had no authority to convey the 135.5-foot strip by the Conkling patent, because the department never had any jurisdiction of said strip, it follows that the defendant had the right to show such want of jurisdiction by any evidence competent to prove the facts, from which the want of jurisdiction followed as a legal conclusion. The facts relied upon for that purpose were the true boundaries of the Conkling claim as marked upon the ground when officially surveyed for patent. There could be no better evidence of these facts than the field notes of the Conkling patent survey. If this evidence could not be received in a suit in equity to quiet title to this 135.5-foot strip, where could it be received? When once a patent has been awarded to the mineral lands of the United States and has been issued, delivered and accepted, all right to control the title or to decide on the right to the title has passed from the land office. Not only has it passed from the land office, but it has passed from the Executive Department of the Government. It is true that in contested cases the decision of the land

department awarding the patent to one person, is subject to an appeal, if taken in time. But if no such appeal be taken and the patent, issued under the seal of the United States, and signed by the President, is delivered to and accepted, title of the Government passes with this delivery. With the title passes away all the authority or control of the Executive Department over the land, and over the title which it has conveyed. *If fraud, mistake, error or wrong has been done, the courts of justice present the only remedy. * * * If an individual, setting up claim to the land, has been injured, he may have his remedy against the party who has wrongfully obtained the title which should have gone to him.* But in all this there is no place for the further control of the Executive Department over the title. The functions of that department necessarily cease when the title has passed from the Government. And the title does so pass in every instance where, under the decisions of the officers having authority in the matter, a conveyance, generally called a patent, has been signed by the President, and sealed and delivered to and accepted by the grantee. It is a matter of course that, after this is done, neither the secretary nor any other executive officer can entertain an appeal. He is absolutely without authority.

Moore v. Robbins, 96 U. S. 536, 24 L. Ed. 848.

Of course, there could have been no appeal from the action of the land department in awarding the 135.5-foot strip to the Boss Mining Company, by the Conkling patent. The Boss Mining Company (the applicant) had not

by its proceedings claimed any part of the 135.5-foot strip. *It had not caused it to be included in the survey and had posted no notice on it.* The land department never took jurisdiction of the 135.5-foot strip. The owner thereof had no notice, personal or constructive, that a patent for the 135.5-foot strip was being applied for. The patent, therefore, as to the strip in controversy, was void.

The only evidence by which want of jurisdiction of the land office could be shown was evidence that the 135.5-foot strip had never been seized and brought under the dominion of the land department, or, in other words, that it was not included within the boundaries of the Conkling claim. That such evidence was admissible is established by the following authorities:

- Moore v. Robbins*, supra;
- Shepley v. Cowan*, supra;
- Thompson v. Whitman*, 18 Wall. 457;
- Knowles v. The Logansport Gas-Light & Coke Company*, 176 U. S. 356;
- Hall v. Lanning*, 91 U. S. 160;
- Pennoyer v. Neff*, 95 U. S. 714;
- Cole v. Cunningham*, 133 U. S. 107;
- Simmons v. Paul*, 138 U. S. 439;
- Thormann v. Frame*, 176 U. S. 350;
- Bell v. Bell*, 181 U. S. 175;
- Galpin v. Page*, 18 Wall. 350;
- Clarke v. Clarke*, 178 U. S. 186;
- 23 Cyc. 1068.

Evidence, that the land department has no jurisdiction of the land in controversy and no authority to convey it, has been received in many cases *at law*. "It has always been held that an absolute want of power to issue a patent could be shown in a court of law to defeat a title set up under it, though where it is merely voidable the party may be compelled to resort to a court of equity to have it so declared."

Sherman v. Buick, 93 U. S. 209;

Stoddard v. Chambers, 2 How. 317;

Easton v. Salisbury, 21 How. 426;

Reichart v. Felps, 6 Wall. 160.

In *Polk's Lessee v. Wendal*, 13 U. S. (9 Cranch) 87, Chief Justice Marshall, delivering the opinion of this Court, said:

"The laws for the sale of public lands provide many guards to secure the regularity of grants, to protect the incipient rights of individuals, and also to protect the state from imposition. Officers are appointed to superintend the business; and rules are framed prescribing their duty. These rules are, in general, directory; and when all proceedings are completed by a patent issued by the authority of the state, a compliance with these rules is presupposed. That every prerequisite has been performed, is an inference properly deducible, and which every man has a right to draw from the existence of the grant itself. It would, therefore, be extremely unreasonable to avoid a grant in any court for irregularities in the conduct of those who are appointed by the government to supervise the progressive course of a title from its commencement to its consummation in a patent. *But there are some things so essential to the validity of the contract, that the great princi-*

ples of justice and of law would be violated did there not exist some tribunal to which an injured party might appeal, and in which the means by which an elder title was acquired might be examined. In general, a court of equity appears to be a tribunal better adapted to this object than a court of law. On an ejectment, the pleadings give no notice of those latent defects of which the party means to avail himself; and, should he be allowed to use them, the holder of the elder grant might often be surprised. But in equity the specific points must be brought into view; the various circumstances connected with those points are considered; and all the testimony respecting them may be laid before the court. The defects in the title are the particular objects of investigation; and the decision of a court in the last resort upon them is decisive. The court may, on a view of the whole case, annex equitable conditions to its decree, or order what may be reasonable, without absolutely avoiding a whole grant. In general, then, a court of equity is the more eligible tribunal for these questions; and they ought to be excluded from a court of law. But there are cases in which a grant is absolutely void; as where the state has no title to the thing granted; or where the officer had no authority to issue the grant.” //

The above case shows that even at law when title under a patent is set up, as in the case at bar, he, against whom the title is asserted, may show that the patent is void; and evidence to prove that the grantor in the patent did not own the land which the patent purports to convey, is receivable, and is sufficient to avoid a patent. This is especially true where the defendant, who challenges the patent, was himself the real owner of the land or where he is the successor in interest of the real owner.

In *Patterson v. Winn*, 24 U. S. (11 Wheat.) 380, this court, speaking by Mr. Justice Thompson, refers to the case above cited, *Polk's Lessee v. Wendal*, (9 Cranch Rep. 87) and says:

"We may therefore assume, as the settled doctrine of this court, that if a patent is absolutely void upon its face, or the issuing thereof was without authority, or was prohibited by statute, or the state had no title, it may be impeached collaterally in a court of law, in an action of ejectment. But, in general, other objections and defects complained of must be put in issue, in a regular course of pleadings, on a direct proceeding to avoid the patent."

We call attention to the case of *Richmond Mining Company of Nevada v. E. H. Rose et al.*, 114 U. S. 579. In that case an application for patent was filed in the United States Land Office for the St. George lode mining claim. The plaintiffs filed an adverse claim alleging a conflict with its Uncle Sam claim.

Within the time allowed by Section 2325, Revised Statutes U. S., plaintiff brought an action in the proper court in the State of Nevada to determine the title to the conflict area. Great delay ensued in the state court, and finally, after several years, the defendants, original applicants for patent, produced before the register and receiver of the land office the certificate of the clerk of the court, to the effect that the action (brought in support of the adverse claim) had not been placed upon the trial calendar, nor any proceedings had thereon from the March term, 1874, to date of the certificate.

U. S. Revised Statutes, Section 2326, provide that "it shall be the duty of the adverse claimant, within thirty

days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim."

The land officer, to whom the defendant presented this certificate of the clerk, holding it to be sufficient evidence that the cause brought in the state court had not been prosecuted with reasonable diligence, and that therefore the adverse claim had been waived, proceeded to prepare the necessary papers, on which the commissioner issued the patent. The Supreme Court of the United States says that the Land Department of the Government had no jurisdiction to determine that the adverse claim had been waived, and that the patent, so far as it affected the rights of the plaintiff, was therefore void. The court says:

"Looking at the scheme which this statute presents, and which relates solely to securing patents for mining claims, it is apparent that the law intended, in every instance where there was a possibility that one of these claims conflicted with another, to give opportunity to have the conflict decided by a judicial tribunal before the rights of the parties were foreclosed or embarrassed by the issue of a patent to either claimant. The wisdom of this is apparent when we consider its effect upon the value of the patent, which is thereby rendered conclusive as to all rights which could have been asserted in the proceeding, and that it enabled this to be done in the form of an action in a court of the vicinage, where the witnesses could be produced, and a jury, largely of miners, could pass upon the rights of the parties, under instruction as to the law from the court."

In *Lakin v. Dolly*, 53 Fed. 333, it was decided by Hawley, District Judge, (who enjoyed a high reputation as a mining lawyer), that a land patent from the Government of the United States, issued with all the forms of law, may be shown to be void by extrinsic evidence which is capable of showing a want of authority for the issuing of the patent. The learned Judge quotes from the opinion of Mr. Justice Miller, in delivering the opinion of this court in *Doolan v. Carr*, 125 U. S. 624, as follows:

“There is not a question as to the principle that where the officers of the government have issued a patent in due form of law, which on its face is sufficient to convey the title to the land described in it, such patent is to be treated as valid in actions at law as distinguished from suits in equity, subject, however, at all times to the inquiry whether such officers had the lawful authority to make a conveyance of the title. But if those officers acted without authority, if the land which they purported to convey *had never been within their control*, or had been withdrawn from that control at the time they undertook to exercise such authority, then their act was void,—void for want of power in them to act on the subject matter of the patent,—not merely voidable; in which latter case, if the circumstances justified such a decree, a direct proceeding, with proper averments and evidence, would be required to establish that it was voidable, and should therefore be avoided. The distinction is a manifest one, although the circumstances that enter into it are not always easily defined. It is, nevertheless, a clear distinction, established by law, and it has been often asserted in this court, that even a patent from the government of the United States, issued with all the forms of law, may be shown to be void by extrinsic evidence, if it be

such evidence as by its nature is capable of showing a want of authority for its issue."

We next call attention to the case of *Francoeur v. Newhouse*, 40 Fed. 618. This was an action to recover possession of lot 52, Section 13, Township 17 North of Range 11 East, Mt. Diablo Meridian. Plaintiff claimed title by conveyance from the Central Pacific Railroad Company, which acquired title under the Act of Congress passed July 1, 1862, (12 St. 489). After the railroad company had acquired its title, and on April 20, 1885, a vein or lode of quartz bearing gold in paying quantities was discovered within the premises in question. A location was made, and thereafter a patent was issued for the claim under the mining laws of the United States. The defendant relied upon this patent.

It was held, Sawyer, J., delivering the opinion of the Court, that a title vested in the railroad company by the congressional grant and performance of the conditions specified therein; that the Government of the United States, at the time of the issuance of the mineral patent, had no title to any part of the premises in controversy, and that the patent was therefore void.

This Honorable Court, in *Smelting Co. v. Kemp*, 104 U. S. 641, speaks as follows:

"Of course, when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and execute it; that is to say, in a case where the lands belonged to the United States, and provision had been made by law for their sale. If they never were public property, or had

previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the department would in that event be like that of any other special tribunal not having jurisdiction of a case which it had assumed to decide. Matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such cases the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it was competent to act."

And in *Wright v. Roseberry*, 121 U. S. 519, the Supreme Court quote and approve the foregoing, and further quote and approve another passage, as follows:

"A patent may be collaterally impeached in any action, and its operation as a conveyance defeated by showing that the department *had no jurisdiction to dispose of the lands*; that is, that the law did not provide for selling them, or that they had been reserved from sale, or dedicated to special purposes, *or had been previously transferred to others*. In establishing any of these particulars, the judgment of the department upon matters properly before it is not assailed, nor is the regularity of its proceedings called into question; but its authority to act at all is denied, and shown never to have existed."

This point was also decided in *Doolan v. Carr*, 125 U. S. 618.

In speaking of the conclusiveness of patents, this Court said in *Wright v. Roseberry*, 121 U. S. 519, that "it is the duty of the land department * * * to determine

whether land patented to a settler is of the class subject to settlement under the pre-emption laws; and its judgment as to this fact is not open to contestation in an action at law by a mere intruder without title. But this doctrine has no application where a party, whether plaintiff or defendant, asserts title to premises in controversy from a paramount source, or by a prior conveyance from a common source. The doctrine that all presumptions are to be indulged in support of proceedings upon which a patent is issued . . . has no application where it is shown that the land in controversy had, before the initiation of the proceedings upon which the patent was issued, passed from the United States. The previous transfer is a fact which may be established in an action at law as well as in a suit in equity. *N*

We submit that the learned Court of Appeals was in error in holding that the field notes, referred to in our main brief, were inadmissible in evidence. We take it, however, that the Court did not consider that the field notes were *incompetent* as evidence of the facts to which they related, but that the facts of which the field notes were evidence, were themselves irrelevant and immaterial. This was in effect deciding that the actual boundaries of the Conkling claim, as marked upon the ground, were immaterial. We submit that this in turn was equivalent to holding that it was immaterial and irrelevant to inquire whether the land department had jurisdiction of the 135.5 foot strip. This conclusion of the learned Court of Appeals, we most humbly submit, was erroneous and ought to work a reversal of its judgment.

If the facts which the field notes tended to prove were relevant, their competency to prove such facts is clear.

3 *Wigmore on Evidence*, page 1665.

The learned Court of Appeals says in its opinion in this case that:

"The department adjudged and conveyed to the patentee a tract 'bounded, described and platted as follows,' and then set forth a boundary by course and distance, carefully describing the two posts at the east end of the claim mentioned in the field notes, and as carefully disregarding and omitting all reference to the two posts at the west end of the claim mentioned in the field notes, and adjudging the second course to be . . . 'west 1500 feet to corner No. 3.'"

It is very difficult for us to accept the conclusion of the learned Court of Appeals that the land officers of the Government, in drafting the Conkling patent, premeditatedly and deliberately, or "carefully," disregarded the monuments called for by the field notes as marking the westerly end line of the Conkling claim, and *designedly* gave a length to the side lines which would extend the claim beyond the known monuments called for in the field notes, (which were before them), and thereby include a portion of a senior location. We do not readily grasp by what process of reasoning or from what "other evidence" the land officers of the Government could assume that they had power to extend the calls of the Conkling patent beyond the monuments erected by the official survey and described in the official field notes as marking the boundaries of the Conkling claim. We think

that upon a very little reflection this Court will conclude that the land officers of the Government, as matter of fact, entertained no such intention. If we assume that they did have such an intention, they were guilty of a wholly unwarranted and arbitrary act, altogether in excess of their jurisdiction, and operating, unless relief against it is now afforded by this Court, as a fraudulent encroachment upon the rights of the owners of the 135.5 foot strip.

Our contention is that the action of the land department of which we are complaining (assuming that the learned Court of Appeals has placed a correct interpretation upon such action) was entirely beyond its jurisdiction, but we are not wedded to the word "jurisdiction." If the action of the department in including in the patent this 135.5 foot strip is permitted to stand, the owner of the strip was clearly deprived of it without due process of law. We cannot take hold of the idea that a judgment rendered without due process of law is yet a judgment which a court has jurisdiction to render. Our theory is that without due process of law to bring the defendant before the court, or in a proceeding in rem, to subject the property to the power and control of the court before entering a judgment against it, the Court has not jurisdiction to enter a judgment. Nevertheless, if it is insisted that it still has jurisdiction to render a judgment under such circumstances, we insist such a judgment is void. In the words of this Court:

“A sentence of the Court pronounced against a

party without hearing him or giving him an opportunity to be heard is not a judicial determination of his rights and is not entitled to respect in any other tribunal.

The doctrine, that where a Court has once acquired jurisdiction it has a right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is only correct when the Court proceeds after acquiring jurisdiction of the cause according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it."

Windsor v. McVeigh, 93 U. S. 277;

Hagar v. Reclamation District, 111 U. S. 712;

Hart v. Sansom, 110 U. S. 151;

Scott v. Shearman, 2 W. Bl. 977, 7 Eng. Rul. Cas. 17;

Herbert v. Bicknell et al., 233 U. S. 70;

Heidritter v. Elizabeth Oil Company, 112 U. S. 294-310;

Ontario Land Company v. Wilfong et al., 162 Fed. 999;

Bunnell v. Bunnell, 25 Fed. Rep. 216;

Bischoff v. Wethered, 9 Wall. 812;

Outhwile v. Porter, 13 Mich. 533;

Tyler v. Peatt, 30 Mich. 63;

Booth v. Conn. Mutual Life Ins. Co., 43 Mich. 299;

McEwan v. Zimmer, 38 Mich. 765.

Mr. Justice Field, speaking for this Court, has said:

"That if they (the officers of the land department)

err in the construction of the law applicable to any case, or if fraud is practiced upon them or they themselves are chargeable with fraudulent practices, their rulings may be reversed and annulled by the courts when a controversy arises between private parties founded upon their decisions."

Shepley v. Cowan, 91 U. S. 340;

Moore v. Robbins, 96 U. S. 356. "

In conclusion on this question we beg leave to submit:

That the construction of the Conkling patent by the Court of Appeals is clearly erroneous: The monuments upon the ground should be allowed to control the length of the side lines of the Conkling claim according to the general rule. But if we assume that because of the language of the patent the courses and distances control the monuments on the ground, then we insist that the patent is void so far as it purports to grant any portion of the ground in controversy here.

II.

We insist that monuments are actually called for at the end of the second and third courses given in the Conkling patent; that the call for "corner No. 3" and the call for "corner No. 4" are equivalent to calls for posts Nos. 3 and 4; and that we have here in fact a typical case, where there is a conflict between the length of one of the lines called for in the patent, and the monument at which this line, by the terms of the patent itself, is required to terminate.

By the terms of the patent the word "corner" is used

synonymously with the word "post." The patent reads, "beginning at *corner No. 1, a pine post 4 inches square marked,*" etc. Here it is seen that the corner No. 1 is not a reference to a mere mathematical angle. It is stated to be "a pine post 4 inches square, marked U. S. 689 P-1." * * * "Corner No. 2" is also stated to be a post. The patent does not describe corner No. 3, nor corner No. 4 as it does corners Nos. 1 and 2. Nevertheless these *numbered* corners are referred to as the west end of the north side line and the south end of the west end line respectively.

In running out the description we are required to terminate the second course at a numbered corner (No. 3), and the third course at a numbered corner (No. 4). It is not a case of a conveyance in which the length of the particular line is given without a specification of an object, as the terminus of the line. In each case something bearing a number is called for at the end of the line. No patent could lawfully issue until corners No. 3 and No. 4 had been marked by monuments. The law required also that these corners should be numbered, and a reference, therefore, to Corner No. 3 and Corner No. 4 can mean nothing less than a reference to the posts or monuments scribed as corners No. 3 and 4. It has been decided that a reference to a corner which has been marked, established and built upon is a reference to the object marking the corner.

In a New Jersey case, the Court said:

"The only monument referred to to ascertain the

location is the beginning corner, which is described as the Northeast corner of High or Straight Street and Willis Street. That language may refer either to the point of intersection of the lines of the streets as actually laid out, or to the actual corner of the street as actually opened and improved or occupied. If the streets had not been opened, or, if opened, if no fences or buildings had been erected to designate the position of the sides of the streets, the language must be understood to refer to the mathematical corner, and the beginning must have been ascertained by running the lines of the streets as laid out to the point of intersection. On the other hand, if the streets had been opened and improved,—if the corner had been built upon and thus clearly ascertained, the language of the deed may, with propriety and more naturally refer to the actual corner as it existed than to an imaginary corner to be ascertained by running the streets according to the actual survey. In common parlance, in speaking of the corner of a street, reference is had to the actual corner as it exists and as it has been defined by buildings or improvements.”

Den D. Haring v. Van Houten, 22 N. J. Law Reps. 66-67.

In a Vermont case involving boundaries, the deed in question described the line as running from a certain “corner” on a given course a given number of rods, to another “corner.” The deed failed to state whether such corners were marked on the land or not. It appeared by parol evidence, however, the corners called for were, in fact, marked by monuments on the ground. It was held that the authentic line was a straight line *from one monument marking a corner to the other monument marking a corner*, notwithstanding this line did not conform in course or distance to the line given in the

deed. The Court says that "If the corners had not been marked, it would have been necessary to follow the course and distance given in the deed, but since the corners were marked, the corners must be found by finding the monuments."

John Clary v. Patrick McGlynn, 46 Vt. 347.

The case at bar is stronger than the Vermont case. In that case the call was for a "corner." There was nothing in the deed to show whether the corner was marked on the land or not, and no law required it to be marked.

We do not question the general rule that where there is in a private deed of conveyance a call for a boundary line of given distance without any statement that the end of the line is marked upon the ground by any post, monument or other object, parol evidence is not receivable to show that as matter of fact the line was intended to end at a given post, monument or other object. The intention of the parties as to what is conveyed is to be determined in a private conveyance altogether from the language of the conveyance. The deed being the final repository of the intention of the parties is not in such cases suffered to be altered by parol testimony. If the deed does not upon its face show an intention that its calls for distances shall be limited by monuments, it is presumed that no such intention existed. But with respect to a patent to a mining claim the situation is obviously quite different.

When, after the expiration of the period of publication, the Land Department of the Government comes to issue the patent, it is then clearly understood by the

grantor, the grantee and the owners of adjoining claims, that it is intended to grant not some particular number of acres of ground, but only the claim as it is bounded and marked out by the official monuments of the patent survey.

If now a controversy should arise as to the true boundaries of the claim surveyed, and the grantor insisted upon the boundaries as marked out upon the ground in the patent survey, it would be nothing less than a hollow pretense for the grantee to assert that it was not intended that the calls for distances should be limited or controlled by the monuments upon the ground, to insist that the *patent* did not disclose such an intention, and that as it was the final repository of the intentions of the parties, no other source for the proof of such intention could be looked to

The answer to such a contention would be obvious. The patent is not the final repository of the intention of the parties; to ascertain their intention regard must be had to the law authorizing the issuance of the patent and the proceedings required to be taken for the protection of the rights of third parties before the patent may lawfully issue.

III.

Was there sufficient evidence to justify the finding of the Chancellor that the westerly end line of the Conkling claim, as surveyed for patent, was only 1364.5 feet from its easterly end line, so that the claim included no portion of the 135.5 foot strip?

In order to a proper understanding of the testimony upon this point constant reference will be necessary to the defendant's map, Exhibit "B," showing the surface of a large number of adjoining mining claims. For convenient reference see Exhibit 45, page 513, Record Case No. 5188, petitioner's appeal.

We have already set out the evidence by which the defendant sought to establish the westerly end line of the Conkling claim. It begins with the evidence of Mr. Brooks. (Record page 78, Case No. 3977.) It will be observed in our review of the evidence on this question that the Nero claim was officially surveyed for patent by Joseph Gorlinski (long since deceased) on April 1, 1881. The Nero claim, according to the testimony of Mr. C. P. Brooks, civil and mining engineer, whose testimony was absolutely undisputed, is correctly platted and laid down upon the map, Exhibit "B," from actual surveys.

(See Record, page 78; also Ex. 45, Pr. Rec. Case 5188.)

If the sworn testimony of a United States Deputy Mineral Surveyor, who is a civil and mining engineer of many years' experience, when his testimony is uncontradicted and unquestioned, can establish any fact, then it must be deemed a fact established in this case that the Nero claim was correctly platted upon Exhibit "B." (Ex. 45, Case 5188.)

Mr. Charles P. Brooks testified that the northeast corner, Post No. 1 of the Nero was found lying upon the ground in a mound of stones in 1908, *at the very place called for in the field notes of the Nero claim.* The post was properly marked as a corner of the Nero, as fol-

lows: "U. S. 192, P. 1." While making a survey of the Missouri lode, Lot 272, Mr. Brooks found Post No. 2 of the Nero claim, the northwest corner, *on July 29, 1882*. On November 3, 1910, he found the post lying on the ground in the vicinity of its original location.

The field notes of the Pirate King, Lot 580 (see the little map, Exhibit 45), show that the southwest corner of the Nero claim and the northwest corner of the Pirate King *are identical*. On September 2, 1908, Mr. Brooks found an old quaking asp post in mound of stones very much rotted, but with marks still visible. The post was marked "U. S. 192—P. 3.—U. S. 580 P. 4,—" a single post, marking the common corners of the Pirate King and the Nero claims.

The Hope mining claim, Lot 260, was surveyed *May 16, 1882*, by Mr. Joseph Gorlinski, who had previously surveyed the Nero. The field notes of the Hope show that the easterly end line of the Hope and the westerly end line of the Nero are identical. The field notes of the former claim call for a shaft twelve feet deep, south 48 degrees, 45 minutes west, 151 feet distant from the discovery stake of the claim. R. H. Brown, an old and highly respected mining engineer, testified that he made a survey of portions of the Hope claim within two years preceding the trial; that he found the discovery point called for in the field notes of that claim; ascertained the course and distance from the discovery point to the shaft mentioned in the field notes, and found the shaft to be practically at the point given in the field notes. He testified: "I can give it to you exactly as I found it: south 49 de-

grees, 25 minutes west, 151 feet from the discovery shaft." It will be observed that there is a difference of but a few minutes between the course given in the Hope field notes by Mr. Gorlinski and the course found by Mr. Brown. The difference is only 39 minutes, and is easily accounted for upon the supposition that Mr. Brown may not have sighted upon the particular part of the shaft taken by Mr. Gorlinski. This testimony proved that the Hope shaft and the Hope discovery points were properly located upon the defendant's map, Exhibit B. These two objects fix the easterly end line of the Hope claim as shown upon defendant's map, Exhibit B. (See Ex. 45, Rec. Case 5188.) According to the statement contained in the field notes of the Hope claim, surveyed as long ago as 1882, this is also the westerly end line of the Nero.

According to the map, defendant's Exhibit "B," introduced in evidence in the case, the westerly end line of the Nero, as determined from actual survey, from the monuments found upon the ground is placed very slightly west of the easterly end line of the Hope.

The patent call for the west end line of the Nero (between Posts 2 and 3), is south 12 degrees 40 minutes east, 200 feet. The course and distance of the call between Post 2 and Post 3 of the Nero, as established by Mr. Brooks' survey from the monuments found upon the ground at those corners is the same. (See map, defendant's Ex. "B," and Ex. 45, p. 513, Printed Record in Case 5188.)

There was not a syllable of testimony introduced in the

case tending to dispute the correctness of the platting of the Nero, Lot 192, on our Exhibit "B."

The field notes of the Pirate King, Lot 580, contain the statement that Post No. 3 of Lot 192 (southwest corner) Nero lode, and the northwesterly corner of the Pirate King claim are both on line.

Post No. 4, then, of the Pirate King (the northwest corner), if this statement in said field note is correct, should be found beside Post 3 of the Nero. On the defendant's Exhibit "B" the Pirate King is platted with the northwest corner, Post 4, as identical with the southwest corner, Post 3, of the Nero.

All the facts above recited were proved by testimony absolutely uncontradicted. It will be seen, therefore, that the trial court, if it was to have any respect for the testimony, was obliged to find that the northwest corner of the Pirate King and the southwest corner of the Nero were at the point platted on the defendant's map. No other conclusion from the testimony was possible. The patent to the Pirate King was introduced in evidence and in the patent it is stated that the line between Post No. 4 of the Pirate King, its northwest corner, and Post 3, its southwest corner, runs "south 12 degrees 40 minutes east 200 feet to Post No. 3." If the southwest corner of the Pirate King had never been found on the ground its position nevertheless was established by proof of the position of the northwest corner and the patent call from the northwest to the southwest corner. But according to the testimony of Mr. Brooks, Mr. Gorkinski and Mr. Smith, Post No. 3 of the Pirate King (the southwest

corner) was actually found upon the ground *standing in a mound of stones in place*, south 12 degrees 20 minutes 30 seconds east, 195.6 feet from Post No. 4 of the Pirate King. Mr. Brooks testified that he found there an old stake in a mound of stones marked "U. S. 580, P. 3." By reference to the field notes of the Pirate King, we find that this is the original southwest corner of that claim as actually found upon the ground in the mound of stones. It is within a foot or two of the point called for by the patent.

We come now to the field notes of the Conkling, Lot 689. In these field notes it is stated that *Post No. 3, the southwest corner of the Pirate King, and Post No. 3, the northwest corner of the Conkling, are identical*. If we should pause here and say that there was no other evidence of the position of the westerly end line of the Conkling claim, except this evidence as to the northwest corner of the claim, and the patent call from that corner to the southwest corner, it would have to be admitted that the 135.5-foot strip was outside of the Conkling claim as monumented for patent. But there is more evidence. Mr. Gorlinski testified that he went to the northwest corner of the Conkling claim *in June, 1902*, when he was locating the southwest corner of the Custer No. 2, and that he then found at the northwest corner of the Conkling *a post firmly set in the ground marked "U. S. 580, P. 3"* (southwest corner of the Pirate King), and lying right down by the side of it a post marked "U. S. 689—3" (northwest corner of the Conkling), and he says there was a mound of stones around the Conkling

post, and that the Pirate King post was *standing in a mound of stones*.

Post No. 3, marking the northwest corner of the Conkling, was also found by Mr. J. Fewson Smith while he was making a survey of the Arctic claim, Lot 3502, on November 3, 1897. Mr. Smith testified that in making that survey he found *in place* the post designating the northwest corner of the Conkling claim, and his notes made at the time of the survey of the Arctic, Lot 3502, actual survey notes required by law to be made, and which the surveyor swears to make correctly—states that he tied to that corner of the Conkling. Mr. Smith's notes made at the time of the survey of the Arctic claim contain the following memorandum:

"Corner No. 3, a pine post 4 feet long, 4 inches square, set 18 inches in the ground and surrounded by a substantial mound of stones. I marked same 3-3502. A cross on a pine tree 8 inches in diameter bears south 62 deg. 30 min. west 41 feet. I marked the tree '3-3502-B. T.' Corner No. 3 of Lot 689, Conkling lode, bears north 21 deg. 9 min. west 132.2 feet. This corner No. 3 (Arctic) is on line 3-4, Lot 689, Conkling lode."

Mr. Smith, continuing, testified: "I determined the northwest corner of the Conkling, to which Post No. 3 of the Arctic was tied, by the fact that near the post—Post No. 3 of the Conkling—was standing, agreeing in general to the description and location in correct relation, *two large trees which are marked as bearing trees to that corner*. I had a copy of the official survey of the Conkling claim with me, and I used that in determining

that this post was either rightly placed or very close to it. It had all the marks which the field notes called for. I found the bearing trees called for in the official notes of the Conkling, and I made measurements to check the position." Mr. Smith says that he satisfied himself that the corner was correct with relation to the pine and balsam called for by the Conkling field notes. He says:

"So far as my observation went to the post, I wanted to support the proposition and make sure; so I ran the course and distance of these bearing trees to verify my ideas as to the correctness of the post at this point to my satisfaction. I triangulated the line down to the southwest corner and tied together along the line to the post (at the southwest corner). I am very sure of that, and whether I found it or not, I cannot state. I don't know how far I followed the course to find that other corner (southwest corner). I certainly would go 600 feet to find the post. I cannot state just what I did find there because I established one post (post 3 of the Conkling) that I was sure was absolutely right.

"The posts I found standing were protected by underbrush, and if they were not torn out you could get a fairly permanent post with brush around it."

"I was on the ground in the vicinity of the northwest corner of the Conkling in 1907 with Mr. Brooks. We came at that time to post 3 of the Arctic as I had it set at the time we made the survey. I can say that we found this post in its proper position. I went to the bearing trees called for in the official notes of the survey of the Conkling in connection with the northwest corner. I found the trees still standing there, marked as called for in the official notes."

Think of the cogency of this evidence! In 1897, a Deputy Mineral Surveyor of the United States, surveying the Arctic claim, writes, in his official notes, that corner No. 3 of Lot 689, Conkling lode mining claim, bears north 21 deg. 9 min. west 132.2 feet from Post No. 3 of the Arctic. If this statement is true (and what reasonable mind can doubt the truth of it?) the northwest corner of the Conkling claim, Post 3, is at the identical place claimed by the defendant to be its true position, as platted upon its maps. Mr. Smith says in his notes of the survey of the Arctic that corner No. 3 of that claim is on the line between Posts 3 and 4 of the Conkling lode, Lot 689, and it was so laid down on the defendant's map, Exhibit "B."

Mr. Brooks testified that he saw this post No. 3 of the Arctic and its position in 1908, and that it stands practically on the west end line of the Conkling claim.

In regard to the northwest corner of the Conkling and the southwest corner of the Pirate King, Mr. Brooks testified as follows:

"Among the field notes of the Pirate King is the following: 'From Post No. 3 a balsam pine 14 inches in diameter bears south 14 deg. 15 min. east 28 feet distant, marked U. S. 580 P. 3 B. T.' I found a tree so marked. It is still standing. My notes show that it bears south 39 deg. 37 min. west 26.9 feet distant. The tree as I found it is marked by a red triangle with a little representation of a pine tree upon map, Exhibit 'B,' and marked 'nail in red balsam,' etc. It is so marked upon the ground. If we take the course and distance as called for in the field notes of the Pirate King, this tree would be as represented

by the dotted blue line with a blue circle marked 'B. T.,' in a southerly direction from the tree mentioned in the notes. Taking the field notes of the Conkling, there is a red pine 17 inches in diameter bears north 16 deg. 16 min. east 35 feet, marked 'U. S. 689 P. 3 B. T.' I found this tree standing marked as called for. I found the course nearly the same as that found in the official field notes, but the distance was different. It was the difference between 22.1 and 35 feet. Drawing a line between two trees as they would be if as called for in the field notes upon which the survey of the Conkling was based, I find that the line as I found it upon the ground would be between these two points. Taking the bearing trees as found upon the ground and the courses and distances as called for in the field notes, it would place the southwest corner of the Pirate King substantially where I have platted it, within a foot or two." (Tr. 79-80.)

As establishing the genuineness of the marks upon these bearing trees in the neighborhood of the northwest corner of the Conkling, we desire to call attention to the testimony of Mr. Walter H. Wiley. It is not long, and it will be convenient to give it in full:

"I reside at Los Angeles; am a mining engineer; graduated from the Golden School of Mines in 1883, and have followed my profession continuously, first, as a deputy mineral surveyor and assayer, and afterwards as a mining engineer. During the latter months of the year 1911, I was in Park City, in company with Brooks and others, and was over the surface of the claims represented on the map, Exhibit 'B,' and particularly the Conkling. It was in October, 1911, I was there with Brooks and Blood, and had pointed out to me what Mr. Brooks claimed to be the northwest corner of the Conkling. My attention was called to one or more bearing trees that

were called for in the official notes of the Conkling claim. I went to these and observed the markings upon them. I saw a copy of the field notes of the Conkling and observed the calls in these notes for these two bearing trees. I cut out a section of the pine tree and have it with me, and also took some photographs of the trees which illustrate the position. The photographs I now produce. This brown portion at the upper end indicates a portion of the block which was blazed on the tree. In other words, it had been blazed under this brown portion. Since then this growth has occurred. And the annual rings shown at the end of the block show how long ago it was blazed. Counting these rings on the end of the block from the middle out to the edge of the bark, there can be counted about twenty annual rings, showing that this blaze was made at least that number of years ago. This marking on the tree occurring on this side of the bark (were) partly overgrown. As I remember one was the figure 3, half of which was entirely under this portion of the overgrowth, and the other half of which was visible outside of it. In other words, the blazing on the tree had been partly overgrown to the extent as indicated by this ridge on this side of the block, and presumably, another similar ridge on the other side corresponding to this one.

"The piece of wood was offered and admitted in evidence, marked 'Ex. p. J. W. C.'"

"There was also offered and received in evidence three photographs taken by the witness, marked Exhibits 'Q,' 'R' and 'S.'"

Witness continuing: "Exhibit 'Q' is of a tree marked on the photograph, 'Corner 3 of the Conkling, October 18th, 1911.' This shows in the lower right hand portion a post which is there today, back of which a man is sitting in order to make the post plain. The dead tree shown in a portion of the photograph is the balsam, a tree which is one of the wit-

ness' trees, while the other witness' tree would be back and not shown in the picture. The dead tree, or balsam, with the details of the marking which can be plainly seen on close inspection, is shown by this picture. Exhibit 'R' shows a tree 18 inches in diameter. This shows the mark very distinctly on close inspection, because it is well lighted and the sun shining brightly upon it. Exhibit 'S' shows a tree 18 inches in diameter. It shows the blaze, but as the tree is in shadow and the focus not good, it does not show as clearly as the other, which is the tree from which the block referred to was taken, and the block was cut out after the photograph was taken."

Post No. 4, the southwest corner of the Conkling, is proved to be correctly platted on our Exhibit "B" by testimony which is wholly uncontradicted.

Mr. Brooks testified that on August 27th, 1901, he found corner No. 4 of the Conkling, marked "P. 4 U. S. 689," standing in a mound of stones. He says that he was then making a survey of the "20th Century" lode claim, and at that time set the corners marking the latter claim, and that corner No. 4 of the "20th Century" as placed by him was identical with corner No. 4, the southwest corner of the Conkling.

In June, 1907, Mr. Brooks was engaged in a survey of the San Pedro claim, and at that time found post No. 4 of the Conkling had been knocked down, but he found the old mound of stones in the same place he had formerly found it. The post was right alongside the road and had probably been knocked out by travelers.

Mr. Gorlinski also testified in regard to Post No. 4, southwest corner of the Conkling. He says he went to

the southwest corner of the Conkling first in the fall of 1901, and was there in May and June of 1902. He says that when he was first there, there was snow upon the ground, and he did not then find post 4 of the Conkling, but he found a post marked 4—4648, which was the northwest corner of the 20th Century. At that time he says he sought to verify the location of the southwest corner of the Conkling by finding another post of the Conkling claim, and went to the northwest corner of the Conkling, where he found Post 3. He says that he found the course and distance of a direct line between U. S. 689 P. 3, as he found it upon the ground at that time, and 4—4648 (northwest corner of the 20th Century) to be south 21 deg. 15 min. 58 sec. east 598.94 feet. Mr. Gorlinski, in his testimony, calls attention to the fact that, according to the field notes of the Conkling survey, Post 3 of the Conkling is identical with Post 3 of the Pirate King, and he says: "I found the Pirate King post in the ground; that is a positive fact." The patent calls from Post No. 3 to Post No. 4 of the Conkling is south 21 deg. 9 min. 600 feet. According to the survey of that line as shown on our map, Exhibit "B," it is south 21 deg. 12 min. 30 sec. east 600 feet.

The field notes of the Arctic lode, Lot No. 3502, which was surveyed by Mr. Smith in 1897, show that corner No. 4 of Lot 689, Conkling lode claim, is on the easterly end line of the Arctic, and 467.8 feet from the Arctic discovery, and it is so shown on our map, Exhibit "B."

There was not a syllable of testimony produced to indicate that at a point 1500 feet westerly of the northeast corner of the Conkling claim, or at that distance westerly

from the southeast corner of the Conkling, any post or monument had ever been seen or had ever been erected. Evidence of posts in that vicinity would have been at war with the testimony furnished by the field notes of the survey of the Hope, of the Nero, of the Pirate King of the Conkling claim itself, and of the bearing trees to which were tied the southwest corner of the Pirate King and the northwest corner of the Conkling claim.

The trial judge, we insist, correctly found the position of the west end line of the Conkling, according to the intentions of the Silver King Company. No other finding was possible.

Perhaps some comments upon the decision of the Court of Appeals may here be serviceable. By reference to the case in 230 Fed., page 556, it will be seen that the Court of Appeals makes but the most cursory reference to the testimony by which the positions of the posts in question were proved. The Court says:

• • • "the testimony that the stakes were found by two or three surveyors sometimes lying on the ground and sometimes standing in a mound of stones about 1364.5 feet distant from the east line of the claim is the most substantial and persuasive evidence that they were originally placed by the surveyor at about that distance from the east line."

The Court entirely ignores the testimony furnished by the field notes of the Pirate King and the Conkling claim whereby the original position of the northwest corner of the Conkling and the southwest corner of the Pirate King are tied to bearing trees nearby, and the testimony

of Mr. Wiley proving the locations of the bearing trees called for in the field notes. The Court omits to mention the fact that these bearing trees officially marked at the time of the survey of the Pirate King, and the Conkling, were still found standing properly marked at the time of the trial, and that the northwest corner post of the Conkling and the southwest corner post of the Pirate King (identical), ought to be found about 1364.5 feet distant from the easterly line of the Conkling claim, if their positions were correctly described in the field notes with reference to the bearing trees. The evidence of these surveyors who found these posts was persuasive because they found them in the positions where they should have been found, considering the positions of the bearing trees, which had been marked according to the statement in the field notes of the surveys, as permanent monuments or witnesses to the original positions of these posts.

The Court also ignores the fact that the easterly end line of the Hope claim was proved by the position of the shaft upon the Hope and the discovery thereof (permanent monuments), and that according to the field notes of the Hope its easterly end line is the westerly end line of the Nero. As shown by the field notes of the Pirate King, Lot 580, the southwest corner of the Nero, Post 3, and the northwest corner of the Pirate King, Post 4, are identical.

According to the field notes of the Nero its southwest corner, Post 3, was marked "U. S. 192, P. 3," and according to the undisputed testimony of Mr. Brooks this Post

No. 3 of the Nero was found standing in a mound of stones, very much rotted, but with its proper mark still visible, on September 2, 1908. This westerly end line of the Nero then was established by the testimony, because it was just where it ought to be, according to the position of the shaft on the Hope claim. Now, it was also established, as we have shown, that the southwest corner of the Nero and the northwest corner of the Pirate King are identical. If it be asked how is this established?—the answer is that it is established by the statement in the field notes of the Pirate King. Now, these surveyors, referred to by the Court, found a post standing in a mound of stones marked as the southwest corner of the Pirate King—standing in substantially correct relation to the witness tree nearby. Was this the original position of the southwest corner of the Pirate King? How can it be doubted when we find it standing in a mound of stones at the distance from the northwest corner of the Pirate King, upon the course called for in the field notes and patent of the Pirate King claim?

Now, as to the northwest corner of the Conkling. Let us repeat: According to the field notes of the Conkling, Post 3, the southwest corner of the Pirate King, and Post 3, the northwest corner of the Conkling, are identical. Where, then, ought the northwest corner post of the Conkling to be found? Obviously beside the southwest corner of the Pirate King. Was it found there? It was.

The Conkling was surveyed for patent in December,

1890. The Nero and the Pirate King had been surveyed *many years* before. By the monuments on the ground, and fortified by the field notes of those claims, and the bearing trees called for in them, and the Hope shaft and the discovery point of said claim, the westerly end lines of the Nero and the Pirate King were established without dispute, and correctly platted upon the defendant's map, Exhibit "B." The question was not merely whether a post claimed to be marked as the northwest corner of the Conkling claim had been found 1364.5 feet distant from the easterly line of the claim by two or three surveyors. It was not merely the finding of this corner at this point by these surveyors that the defendant relied upon as proof of the original position of the Conkling claim, but it was this evidence taken in connection with the fact that the Hope and the Nero and the Pirate King had been surveyed prior to the Conkling, and that the position of the west end line of the Pirate King, and therefore of its southwest corner, was incontestably determined from the field notes of the last three mentioned claims, and the monuments upon the ground in the positions called for, and the fact that when the Conkling came to be surveyed for patent the surveyor of the Conkling claim stated that the northwest corner of the Conkling was identical with the southwest corner of the Pirate King, a point found and indisputably established, which proved that the position in which these two or three surveyors found a post, as the Court of Appeals says, "sometimes lying on the ground and sometimes standing in a mound of stones," was the position in which the post had been originally

erected at the time of the patent survey of the Conkling claim. We do not understand why the Court of Appeals makes no reference to the testimony by which the southwest corner of the Pirate King was established.

Then, again, if we run a line for the distance and upon the course called for in the Conkling patent, from the southwest corner of the Pirate King (identical with the northwest corner of the Conkling), we reach a point where there was found, according to the undisputed testimony of Mr. Brooks, *on August 27, 1901*, long before this controversy was initiated, a post standing in a mound of stones marked "P. 4, U. S. 689." Mr. Brooks found this post in this position when he was making a survey of the 20th Century lode, and at that time set the corners marking the latter claim, and erected corner No. 4 of the 20th Century lode at a point identical with corner No. 4, the southwest corner of the Conkling. It is true this post was found more than ten years after the patent survey of the Conkling, but it was found standing in a mound of stones upon the course and the distance from the southwest corner of the Pirate King, called for in the Conkling field notes. But this is not the first time that this post was found at this place. It was found in the same position by Mr. Smith in surveying for the Arctic lode in 1897.

There is no object in pursuing this discussion further. In conclusion upon this point, it is sufficient, it seems to us, to say that uncontradicted evidence of the most convincing character, official documentary evidence, shows that the Nero claim in the position in which it was platted

upon the defendant's map, was surveyed many years prior to the Conkling claim; that after the survey of the Nero, the Pirate King was surveyed for patent, and that by the monuments of the Pirate King as marked upon the ground in the patent survey, and as referred to in the field notes of the Pirate King, the northwest corner of the Pirate King, as platted upon the defendant's map, and as originally located upon the ground, was identical with the southwest corner of the Nero. This is a starting point of the utmost reliability, when we consider that the west end line of the Nero was established long before the survey of the Conkling by reference to the shaft upon the Hope claim. The west end line of the Nero being established, of course its northwest and southwest corners are also established.

Starting from this southwest corner of the Nero, which is identical with the northwest corner of the Pirate King, we travel upon the course and over the distance called for in the Pirate King patent, until we reach the southwest corner of the Pirate King, and there these surveyors actually found a post properly marked, set in a mound of stones in correct relation to the witness tree called for in the Pirate King notes, and so we have the southwest corner of the Pirate King established. Now, is it not conclusive that here also was established the northwest corner of the Conkling claim, when it is so stated in the field notes of the patent survey of the Conkling, and there is not a syllable of testimony to the contrary?

In closing our discussion with respect to the boundaries

of the Conkling claim as marked upon the ground by the official survey thereof, we are constrained to say that we can only account for the cursory reference made by the Court of Appeals to the evidence by which the positions of Posts 3 and 4 of the Conkling claim were established, by supposing that the learned Court was so firmly persuaded of the correctness of its legal conclusion that the calls in the Conkling patent could not be controlled by the monuments on the ground, that it overlooked the full significance of the testimony by which the original positions of these posts have been established by the defendant's testimony;—considering the testimony as irrelevant and immaterial, we think that the Court of Appeals failed to give it due weight.

**THE EXTRALATERAL RIGHT ON THE CRESCENT FISSURE
VEIN.**

We next take up for consideration the question of the right of the defendant to pursue the Crescent fissure vein on its downward course between the side-end line planes produced, i. e., the planes A-B and C-D on Figure 1, which planes embrace the ore bodies in dispute.

In the case of *Del Monte Mining & Milling Company v. Last Chance M. & M. Co.*, 171 U. S. 55, this Court, speaking through Justice Brewer, said (page 89):

“Our conclusions may be summed up in these propositions: First, the location as made on the surface by the locator determines the extent of rights below the surface. Second, the end-lines, as he marks them on the surface, with the single exception hereinafter noticed, place the limits beyond which he may not

go in the appropriation of any vein or veins along their course or strike. Third, every vein, 'the top or apex of which lies inside of such surface lines, extended downward vertically' becomes his by virtue of his location, and he may pursue it to any depth beyond his vertical side-lines, although in so doing he enters beneath the surface of some other proprietor. Fourth, the only exception to the rule that the end-lines of the location as the locator places them establish the limits beyond which he may not go in the appropriation of a vein on its course or strike is where it is developed that in fact the location has been placed not along but across the course of the vein. In such case the law declares that those which the locator called his side-lines are his end-lines, and those which he called his end-lines are in fact side-lines, and this upon the proposition that it was the intent of Congress to give to the locator only so many feet of the length of the vein, that length to be bounded by the lines which the locator has established of his location."

The Court of Appeals in its decision in the case at bar, as speaks of the extralateral right provisions of the mining laws:

"But this extralateral right is a special privilege—an exceptional right."

Opinion, Record, p. . . . , 230 Fed. 561.

We respectfully submit that this statement is out of harmony with the decision of this Court in the *Del Monte* case, wherein is approved and quoted the language of Judge Beatty in *Tyler M. Co. v. Last Chance M. Co.* Said Court:

"*Tyler Mining Company v. Last Chance Mining Company*, Circuit Court District of Idaho, decided

by Beatty, District Judge, who, in the course of his opinion, pertinently observed:

"What reason under the law can be assigned why these rights shall not apply when his location is such that his ledge passes through it in some other way than from end to end? The law does not say that his ledge must run from end to end, but he is granted this right of following "all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside his surface lines." Upon this fact that an apex is within his surface lines, all his underground rights are based. When, then, he owns an apex, whether it extends through the entire or through but a part of his location, it should follow that he owns an equal length of the ledge to its utmost depth. These are important rights granted by the law. Take them away and we take all from the law that is of value to the miner.'"

171 U. S. at p. 91.

It has been repeatedly declared by the courts that the intent and purpose of Congress in providing for the acquisition of title to and the sale and disposition of the public mineral domain was to encourage the search for and development of the mineral resources of the nation. To effectuate this purpose it was provided that the locator or patentee of a lode mining claim should have the exclusive ownership, not only of the surface, but of all veins throughout their entire depth, the tops or apices of which were found within his surface boundaries extended downward vertically, between vertical planes passed through the end lines of his location. The end lines were required to be parallel so that he might have at depth the same length of the vein, no more, and no less, than the

length of the top or apex thereof, included within the boundaries of his claim.

The act of 1872 was evidently passed upon the theory that the discoverer of a vein or lode would locate his claim lengthwise thereof so as to include its top or apex within his boundaries from end to end.

The Circuit Court of Appeals for the Ninth Circuit, in *Tyler Mining Company v. Sweeney*, 54 Fed. 284, at p. 290, says:

"The mining laws of the United States were passed upon the theory that the lodes and veins of mineral-bearing rock in their general course could be readily ascertained by the locators, and that, by locating a claim in the form of a parallelogram 1500 feet in length and 600 feet in width, there would be no difficulty in including the lode within the surface ground so located."

A similar statement as to this theory or assumption on the part of Congress is found in *Mining Company v. Tarbet*, 98 U. S. 463; *Del Monte M. & M. Co. v. Last Chance Mining Co.*, 171 U. S. 55, at p. 84; and *Iron & Silver Mining Co. v. Elgin Mining Co.*, 118 U. S. 196, 205.

There is a manifest tendency in the more recent decisions of the courts of the country to put a liberal interpretation upon the act so as to secure to the locator extralateral right upon his vein wherever this can be done, without violation of the plain letter or obvious spirit of the law. It must often happen, owing to the irregularities in the course or strike of veins or lodes, coupled with the fact that in many cases they do not outcrop at the surface, that it will be quite impossible

that the discoverer of a vein can even with the utmost diligence so mark the boundaries of his location that it will include the top of his vein throughout the entire length of the claim. After months, or even years of development, it may be found that the vein, instead of coursing with his claim lengthwise, crosses the located side lines thereof; or that it crosses one located end line and departs from the claim over a side line thereof; or that it crosses one end line and terminates before reaching any other line of his location; or that the top or apex of his vein will be found within his surface boundaries, but does not cross or reach any boundary line of the claim; or that the vein at its top and on its course enters his claim over a side line thereof and after traversing the same for some distance departs therefrom over the same side line.

But in none of such cases is the locator to be deprived of extralateral right upon his vein or veins, for as has been said by the courts it was the purpose and intent of Congress by this act to secure to him laterally throughout its entire depth so much of the vein lengthwise thereof as would equal the length of the top of the vein included within his surface boundaries. At an early date after the passage of the Act of 1872 it was determined by this Court in the case of *Tarbet v. Flagstaff*, 98 U. S., that when the vein on its course and at its top crossed the located side lines of the claim, these side lines must be taken to be the legal end lines beyond which the locator is not permitted to pursue his vein either at or beneath the surface. In that case, as well as in *King v. Amy &*

Silversmith Consolidated Mining Co., 152 U. S. 222-228; *Iron Silver Mining Co. v. Elgin Mining Co.*, 118 U. S. 196; *Del Monte v. Last Chance Mining Co.*, 171 U. S. 55, 89; and *Last Chance Mining Co. v. Tyler Mining Co.*, 157 U. S. 683, it is said that where a vein so crosses the side lines of the claim, these lines are the end lines and the (located) end lines the side lines of the claim. In none of these cases, however, was the question of the right of the locator to follow his vein extralaterally between planes drawn vertically through the located side lines extended in their own direction involved, but in each the courts manifestly entertained the opinion that such right existed. The question of this right was clearly presented and upheld, however, in the case of *Empire M. & M. Co. v. Tombstone*, 100 Fed. 910, 913-914. See also *Last Chance Mining Co. v. Bunker Hill M. & C. Co.*, 131 Fed. 579, 586-8; *State-Idaho M. & D. Co. v. Bunker Hill M. & S. Co.*, 131 Fed. 591, 603-4; *Empire M. & M. Co. v. Tombstone M. & M. Co.*, 131 Fed. 339, 344; *Gleason v. Martin-White Co.*, 13 Nev. 459-460.

In the latter case the Court says:

“Should the discoverer of a vein be ever so unfortunate in locating his claim, he cannot possibly get less than 600 feet of the vein.”

Again, it has been decided that in case the vein at its top and on its course crosses one end line of the claim, and is cut off and terminates before the opposite end line is reached, the locator is under the law entitled to the vein throughout its depth between planes drawn one

through the end line so crossed, and another parallel thereto, through the point where the vein terminates. *Carson City Gold & Silver Mining Co. v. North Star Mining Co.*, 73 Fed. 597, 602-3.

Again, it is well settled that where a vein crosses one end line of the claim but departs therefrom through a side line thereof, the locator is entitled to such vein through its entire depth between planes drawn vertically downward, one through such crossed end line and the other parallel thereto through the point where the vein passes out of the claim through such side line. *Del Monte M. & M. Co. v. Last Chance M. Co.*, 171 U. S. 55.

In *Consolidated Wyomnig Gold Mining Co.*, 63 Fed. 540, the Court at pages 548-9 says:

"The statute should be so construed as to give to the locator what he actually locates; no more and no less. It should be liberally construed in his favor, so as to give him the full benefit of the statute in its true spirit and intent, in order to carry out the wise and beneficent policy of the general government in opening up the mineral lands for exploration and development. When the prospector discovers a vein of ore of sufficient value to justify the expenditure of time, labor and money to open up and develop the same, he is honestly and legally entitled to the fruits of his labor. He is admonished by the law that he will be limited in the length of his lode upon its strike to such portion as is within the surface lines of his location, but he is at the same time assured that he will not be limited or deprived of his extralateral rights as to the depth of such lode, upon its dip, the apex of which is within the surface lines of his location. The statute of 1872 gives to locators of mining claims 'the exclusive right of possession and en-

joyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations.' These are their extralateral rights, which should neither be extended nor restricted by the courts. The only limit placed by the statute is that 'their right of possession to such outside portions thereof as lie between vertical planes drawn downward, as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges.' "

See also *Tyler Mining Company v. Last Chance Mining Co.*, 71 Fed. 848, 851.

In the case of *Keeley v. Ophir Hill Consolidated M. Co.*, Judge Marshall, U. S. District Judge for the District of Utah, presiding as Circuit Judge, decided that where a vein entered and departed from a claim through the same side line, the owner of the claim was entitled to pursue the same extralaterally. In the opinion in that case (which has not been reported) the Court says:

"But when the veins are considered separately it is found that some of them enter a claim of the defendant through its south side line, and, after extending with the length of the claim for a considerable distance, depart therefrom through the same side line without reaching either end line. The defendant depends upon this vein and claim for its extralateral rights as to a part of the ore taken. The question is thus squarely presented as to the existence of the right under these circumstances. It is claimed that to give it is to equitably construe the

mining act of 1872 to meet a case not contemplated when the act was passed and is to do violence to the language of that act.

"It must be conceded, under the authorities, that a vein wholly within the location and coursing along it, but not reaching either end line, gives extralateral rights. Yet it is argued that if it enters through the side line one foot from one end line and extends in substantial parallelism with the side line until it departs from the claim across the same line one foot before the other end line is reached, there will be no extralateral rights. What is the language of the mining act that requires this construction? That act nowhere limits extralateral rights to veins crossing end lines. It is true that such rights are bounded as a maximum by planes projected through end lines; that veins crossing end lines were probably the ideal veins Congress contemplated. But as before stated, that fact does not prevent extralateral rights as to a vein commencing and ending within the location and which never reaches either end line. Further, the oft' mooted question as to the existence of such a right with respect to a vein crossing a side and an end line has finally been settled in the affirmative, a case similarly not contemplated by Congress, and which requires just as equitable an interpretation of the act. The real support for the plaintiffs' contention is found in the earlier decisions of the Supreme Court of the United States, in which it is somewhat broadly stated that the lines of the location actually crossed by the vein are its end lines, whatever they may have been designated by the locator; and rigidly applying this statement, it is said that in the case supposed, the two limiting planes would have to be projected through the same line; and hence, would contain nothing. But the statement referred to must be considered with reference to the facts of the case with which the Court was dealing. Such cases, practically without exception, were

of veins like the Flagstaff vein, coursing across and not along a location. . . .

"I find no reason to deny the defendant extralateral rights on these veins."

In each of the foregoing instances of irregular locations—irregular in that they were not laid upon the vein or lode in the manner which the courts have said Congress contemplated—the extralateral right of the locator was upheld on the ground that from a correct interpretation of the act it was apparent that *the intention of Congress was to secure to the locator the same length of the vein at depth extralaterally as that of the top or apex thereof included within the boundaries of his location*; and that it is the duty of the courts, if possible, to put such a construction upon the act as will give effect to this intention.

The presumption arising from the patents that the location of these claims severally was based upon the discovery of a vein which, at its top and on its course, traverses the claim lengthwise thereof, is, of course, a rebuttable presumption; and in this case it was overcome by evidence free from conflict, that today there is not found any such vein in either of the claims, and the trial court so decided.

Or we may state the proposition in this manner: That there was an inference, arising from the shape of each of the claims, that the locator assumed, in the act of location, that his vein had a course or strike through the earth in a direction substantially parallel to the side lines of said claims, and that since the King Company

asserted an extralateral right upon a vein which crossed the nominal side lines of the claims, it devolved upon that company to go forward with evidence to show that the actual fact was contrary to what might be inferred from the shape of the claims.

Our contention is that there is no presumption of *definite weight*, arising from the shape of a claim, as to the course of the vein or lode contained therein. Whether we say that there is an inference that the vein or lode has a strike approximately parallel to the nominal side lines, or that there is a presumption that it has such a strike, (and if it be true that no extralateral right may be enjoyed upon a cross vein, when there is contained in the claim a vein coursing parallel with its side lines), still we insist that the locator may be allowed extralateral rights upon the cross vein upon introducing evidence which tends to prove the non-existence of a vein running lengthwise of the claim. If this evidence is wholly uncontradicted, we insist that the locator is entitled to a finding in accordance with it. It turns the scales in his favor, because it is the only evidence upon the subject. It is logically impossible to assign to the inference or presumption arising from the shape of the claims a weight sufficient to overcome or balance the positive affirmative evidence introduced by the locator, to the effect that there is no vein coursing lengthwise of the claim. In other words, the inference or presumption here under consideration operates only in the absence of evidence to the contrary. If we assign to the inference or presumption any definite weight, how shall we ever deter-

mine whether or not the affirmative evidence, which tends to prove the fact to be contrary to the inference, is sufficient? To us it seems meaningless to say that there is a presumption as to the course of a vein arising from the shape of the claim, and that evidence which admittedly is competent and credible, and if true, shows that there is no vein of the character supposed, is insufficient to overcome such presumption. If the evidence is positive, competent and credible and as matter of fact tends to prove—and if true does prove—that there is no vein of the character supposed, inferred or presumed, why is such evidence insufficient to overcome such inference, supposition or presumption? If a given quantity of evidence is insufficient, by what test do we determine how much the evidence must be augmented in order that it may be sufficient?

Now, in the case at bar, there was evidence that was positive, competent, credible, uncontradicted and persuasive to the effect that there was no vein running lengthwise of the claims in question. This evidence was accepted by the^{*}Chancellor who heard it, and he made a finding in accordance with it; and the Court of Appeals says that it was insufficient to *overcome the presumption*—thus assigning to the presumption, *a certain definite weight* sufficient to overcome the evidence which was introduced, and leaving totally unanswered the question which naturally arises in the mind, how much evidence is necessary to overcome this so-called presumption? We insist that the doctrine supported by reason and authority is that such inferences and presumptions as we are

here dealing with have no office to perform whatever, except to guide the tribunal in the absence of evidence. When evidence is actually introduced, which if true, shows the fact to be contrary to a so-called presumption or inference, the affirmative evidence then becomes all controlling and the presumption is not to be weighed against it.

See *Thayer's Preliminary Treatise on Evidence at the Common Law*, page 380 *et seq.*

This question Mr. Thayer says was neatly and accurately dealt with by the Court in *Lisbon v. Lyman*, 49 N. H. 553.

The evidence which we will now quote with respect to the absence of any vein coursing lengthwise of any of the claims in question is uncontradicted by anything in the record.

Mr. Wiley, a mining engineer, testified as follows:

"I have been on the surface at the point indicated as the discovery of the Brave Columbia, Constitution, Cumberland and Monroe Doctrine. The discoveries of the Brave Columbia, Constitution and Cumberland are pits in the wash, three feet deep. The discovery of the Monroe Doctrine is in wash four feet deep; that is, today they are caved, but from the appearance of the dumps, I do not think they ever went much deeper, and what was in the bottom of them below the points you can see today, I don't know, except I think they were all entirely in wash. From observations of all the work accessible, not only here but elsewhere in the immediate vicinity, and especially from the fact that the Constitution tunnel working constituted what might be termed a cross-cut entirely across all four of those claims,

and at no point in those workings was there any northerly or southerly vein to be seen, I am clearly of the opinion—(objection interposed and overruled.)

"I preferred to state it as an opinion with the basis, explaining the basis of the opinion. I might perhaps say I know because I have been carefully through there, and I have not seen any vein running in a northerly direction, and there is no vein which is of any extent continuing in a direction at all parallel with the side lines of any one of those four claims." (Rec. 147-8.)

To the same effect is the testimony of Mr. George G. Blood. (Rec., pp. 151-2.)

If there is an inference or presumption arising from the shape of the claims that there is contained in each of them a vein coursing parallel with the side lines, the vein must be presumed to extend the full length of the claims. If it is to be inferred that because the side lines extend in a northerly and southerly direction that there is a vein extending in the same direction then it ought to be inferred that since the claims are 1500 feet in length the vein is 1500 feet in length. If the shape of the claim raises an inference as to the course of the vein, it ought equally to raise an inference that the nominal end lines marked the ends of the vein, as claimed by the locators respectively. It would seem to follow, therefore, that any working which cuts across the claims and fails to reveal any northerly and southerly vein is evidence that no northerly and southerly vein exists in the claims—not only that no such vein is found at the point where the claims are cross cut, but that no such vein is found anywhere in the claims. Now, the four

claims in question are entirely traversed by the Constitution tunnel. (See record, page 513, case 5188, Exhibit 45.) The maps show numerous workings in each of the four claims in question which cross cut the claims from one side to the other, and in none of said workings is there any sign of a northerly and southerly vein.

It is true, as stated in the opinion of the Circuit Court of Appeals, that the discovery pit of the respective claims is but an insignificant portion of the ground covered. But the testimony undisputed, is that the claims are throughout covered by wash or debris to depths varying from 20 to 40 feet. (Brooks, p. 100.) And that apart from work done in the development of the apex of the Crescent fissure vein as it crosses these claims, but little work has been done within the boundaries of either claim. Such workings were examined by witnesses for petitioner, who agree in saying that there is not found in them any vein or seam, even, the course of which is not practically at right angles to the located side lines. And as to the discovery pits themselves, it appears they could not have been more than a comparatively few feet in depth. Some loose earth had fallen into them and the bottoms thereof were not seen. But from the amount of material removed in their excavation, any intelligent observer could determine with approximate certainty the depth, and from the character of such material could say whether it was merely surface wash or whether any part of it was from rock in place. Both Blood and Wiley testified that in their opinion neither of these pits had reached bedrock.

At the trial the Conkling Mining Company, respondent, offered no evidence, made no attempt, to show that there was found or known to exist either at or beneath the surface of either of these claims any vein or lode, or any crack or seam even, the course of which was not at right angles to the located side lines. In this regard respondent relied solely upon the presumption arising from the direction in which the claims had been located and patented. What more satisfactory, not to say conclusive, proof, could be presented to overcome the presumption that these claims were laid upon discovery veins, the course of which was in the direction of the side lines thereof, than that there is not now found in either claim any such vein or lode? If none can now be found the strike of which is not at right angles to the side lines of the claim, it is certain none could have been found by the locator which ran lengthwise thereof.

To assert that the locator must place his claim along the course of the vein at his peril is in many cases to compel him to perform the impossible, especially with claims as narrow as those here involved. It is a well-known fact that the croppings of a vein are always a very imperfect, and often a very deceptive, guide to its course, and it will often be difficult, and sometimes impossible, to locate a surface claim in conformity with the course of the vein, even after years spent in its development. In the case at bar the fact is uncontroverted that the surface of the claims is largely covered to a considerable depth with wash or loose eroded material. This makes the

ascertainment of the position and course of the vein throughout the claim doubly difficult.

The Court in *Cons. Wyoming Gold Mining Co. v. Champion Mining Co.*, 63 Fed. 540, 548, says:

"In a majority of cases where mining locations are made in the form of a parallelogram under the act of 1872, the lode or vein located does not run lengthwise directly parallel with the side lines of the location. The statute is based upon ideal locations of parallelism that seldom, if ever, exist. It is in fact almost impossible to make a perfect surface location, the side lines of which would be absolutely parallel with the lode . . . no matter what length of time is taken before marking the surface boundaries of the location. . . . There is but little, if any, force in the suggestion often made that the locator should postpone the marking of his boundaries until sufficient explorations are made to ascertain the true course and direction of the vein. The present case furnishes a fair example of the difficulties so often encountered by the miner in his efforts to determine the direction of the vein he has discovered.

"*The Wyoming vein has been located, and at different times, worked upon, during the past forty years, and it is still a disputed and closely contested question as to where the lode actually runs; and, in addition to all the regular workings of the mine, it has required the expenditure of money, time and labor in order to enable the witnesses to testify with any degree of certainty to the 'true course and direction of the vein.'* Every practical miner knows the difficulty that is often experienced in ascertaining these facts. The truth is that the miner is often compelled by the law to make his lines of location upon the surface ground before such facts can be ascertained. There is a limit to the time he can take

before marking the boundaries of his claim. He is required to exercise his best judgment from the developments he has been able to make, and he is, of course, confined to his surface location, whether his judgment is right or wrong."

To contend that the locators of the Monroe Doctrine, Cumberland and Constitution claims violated the mining statutes in locating across instead of along the apex of the vein in question is to virtually ignore all of the side-end lines cases and nullify the repeated holding of this Court that the lines crossed by the apex of the vein become the true end lines under such circumstances. But it is urged, the discovery points or shafts shown on each of these claims are upwards of 400 feet distant from the apex of the Crescent Fissure vein. Our opponent virtually admits that the occurrence of a vein at any of these discovery points is "a supposition in all probability contrary to the fact." (Appellant's brief filed before the Circuit Court of Appeals, p. 41.)

As Mr. Morrison in his "Mining Rights," 14th ed., p. 37, tersely states, "the fact of discovery is a fact of itself, to be totally disconnected from the idea of discovery shaft. The discovery shaft is a part of the process of location subsequent to discovery." Even in those states where a discovery shaft is essential, it is not required that the development work shall be performed at the point where the first discovery is made. *Butte v. Northern Copper Co. v. Radmilovich*, 39 Mont. 157, 101 Pac. 1078, 1080. But in the case at bar, at the time these claims were located there was no requirement in Utah, either

State or Federal, making a discovery shaft essential to a valid location. The fact that these discovery points or shafts are designated on the plats as being several hundred feet from the actual vein apex is of no controlling importance. A discovery must have been made somewhere within the boundaries of the claim, and the issuance of the patent gave rise to the conclusive presumption that such a discovery has been made, but when no discovery shaft is required by statute, the mere designation of such a point on the claim does not have the effect of placing a vein there nor of establishing its course when in fact no vein exists.

"This Court cannot presume that the land office determined the course of the lode. The marking of an ideal line across the survey and diagram did not have the effect of putting a lode into the ground if there was no vein there."

Cons. Wyoming Mining Co. v. Champion M. Co., 63 Fed. 540, 552.

The case of *Work Mining & Milling Co. v. Doctor Jack Pot Mining Co.*, 194 Fed. 620, can be readily distinguished from the case at bar, for there the State law of Colorado required the sinking of a discovery shaft which must disclose a crevice or vein. Therefore, patent having been issued, such vein, according to that decision, must be conclusively presumed to exist in such shaft. Such is not the case here, for we have already commented on the fact that at the time these locations were initiated there was no such requirement in the State of Utah.

The learned Circuit Court of Appeals, in its opinion,

says that for twenty-five years no claim was made by the owner of the Brave Columbia, Monroe Doctrine, Cumberland and Constitution; that the Crescent fissure was the discovery vein, that the locators were mistaken as to the course thereof, and that in the meantime the Conkling and many other claims have been located. But the evidence shows that this vein was discovered and followed in its downward course extralaterally by petitioner's predecessors many years before this suit was instituted. For instance, Mr. Wiley testified that the Constitution tunnel (so marked upon map, Exhibit "A,") was an old caved working run through the wash for a distance of forty-one feet, where it encountered the foot wall of the vein. He also testified that from this tunnel the vein can be followed in its downward course through old workings. (Rec. 134.) He says there are old drifts from level No. 3 and that the drift from the Antelope tunnel can be followed to the west (should be east) through what appears to have been an old winze and old stopes showing considerable ore. And Mr. Dailey (Rec. 107), says:

"It (meaning the ore) continued on up through to level No. 3 and connected with that stope there. When I got up within fifteen or twenty feet of the Antelope drift I ran into old workings stoped out that had been done before my time. There was an old stope there below the Antelope drift partially caved, and ore around the edge of it. I did not run the Antelope tunnel."

The drift from the Antelope tunnel, referred to, is shown upon map, Exhibit A, and is so designated thereon. And the stope referred to by Dailey is also shown upon

this exhibit as extending upward from level No. 3, marked "stope," and having therein the station numbers "633," "634." The bottom of this stope is, measured horizontally, 230 feet beyond the southerly end line of the Constitution. Just when this old work was prosecuted the record does not disclose. It was done by the Crescent Company and must have been as early as 1892; for Brooks (Rec. 96) testifies:

"I think the last work was done by the Crescent Company about 1892; but there was work done in there in a small way afterwards."

(The witness is here speaking of the workings of the Crescent Company as a whole, and not in any particular place.)

And Dailey says (Rec. 104) that it was old work when he took charge, which was in 1902.

From the issuance of the patent to each of these claims a conclusive presumption arises that prior to final entry a valid location of the claim, based upon a discovered vein, had been made. Each of the patents in terms conveys the surface area described, together with all veins or lodes throughout their entire depth, the tops or apices of which are found within the surface boundaries between planes passed through the end lines. (That is to say, the legal end lines.)

Now, when many years thereafter it is made to appear that there is but one vein or lode, the top or apex of which is found within the boundaries of the claim, and this vein, instead of being lengthwise, is crosswise of the claim, the only legitimate conclusion, it would seem, would be that

this was the discovery vein, that the course thereof had been mistaken by the locator and his right to follow the same extralaterally between planes drawn through the located side lines should be upheld. To say or to decide that this was not the discovery vein would be to say or to conclude that the location was invalid in that it was not based upon any discovery. It would seem impossible that any locator could have any motive, fraudulent or otherwise, which would prompt him knowingly and intentionally to locate his claim crosswise of the vein he discovered, thus acquiring, as here, but 200 feet in length thereon, when he could secure 1500 feet in length by laying his claim properly. To award to him extralateral right would not injure or prejudice any subsequent locator of an adjacent mining claim. As said by the trial Court in its opinion:

“The locator of the Conkling presumably wished to obtain title to a vein apexing therein. As to other veins passing on their dip at great depth beneath the surface of the Conkling, he knew that he would take subject to the right of the locator of the apex. It is evident that he was in no way influenced by the shape of the defendant's locations. If the locator of the defendant's claims innocently mistook the direction of this vein, the only loss proper to be imposed upon him is the disappointment of his anticipation as to the extent of apex he was acquiring. He in no way wronged subsequent locators.”

Indeed, the top of this vein, being covered by the Monroe Doctrine, Cumberland and Constitution, neither respondent nor any of its predecessors could have made a location covering any portion of this segment of the vein,

for there can be no valid location of a mining claim which does not include the top or apex of a vein. This is apparent from the language of the act, which provides that a claim shall not exceed 1500 feet in length along the vein and shall not extend more than 300 feet on each side of the middle of the vein at the surface.

In *Calhoun Gold Mining Co. v. Ajax Gold Mining Co.*, 182 U. S. 499, the Court says, at page 508:

"Under the old law the miner located the lode. Under the new (the act of 1872) he must locate a piece of land containing the top or apex of the lode. While the vein is still the principal thing in that it is for the sake of the vein that the location is made, the location must be of a piece of land including the top or apex of the vein."

(This case is cited and followed in the later case of *St. Louis M. & M. Co. v. Montana M. Co.*, 194 U. S. 235.)

Through the years petitioner and its predecessors have developed this segment of the vein to great depth, nearly 2000 feet. To take from it now a valuable part of that which has thus been developed and award it to respondent, when neither it nor any of its predecessors could ever have laid a valid location thereon, when it expended not a dollar in the development thereof, would seem to be so unjust and inequitable that a court would not so decree save in obedience to the plain command of the statute.

The Circuit Court of Appeals denies petitioner extralateral rights upon the Crescent fissure vein, upon the theory that there is a presumption that in each of the

claims, the side lines of which are crossed by the apex of the Crescent fissure vein, there is a vein or lode running substantially parallel to the side lines of said claims, and a presumption that these lodes are the discovery lodes in each of the claims respectively; that this presumption was not rebutted by the defendant's evidence, and that, therefore, the defendant's extralateral rights *must be confined to such discovery veins*—that there can be no extralateral rights through the side lines of these claims, and also through the end lines.

1. Petitioner insists that the trial judge rightfully held that petitioner's evidence was sufficient to overcome any presumption that there was a lode or vein in each of these claims running parallel to the side lines thereof, and that the evidence fairly tended to show that the *only* vein or lode which at its top or apex was found in any one of petitioner's three claims, was the Crescent fissure vein crossing the side lines of said claims almost at right angles; and that, therefore, petitioner had the right to follow this vein upon its dip under the surface of the Custer No. 2, Silver Hill No. 4 and the Conkling lode mining claims, and that as the ores in dispute were found within and were a part of said Crescent fissure vein, petitioner had the right to take such ores as its separate and exclusive property.

2. Petitioner also contends that under the logic of the decision of this court in *Jim Butler Tonopah Mining Company v. West End Consolidated Mining Company* (U. S. Sup. Ct. Advance Opinions, 1917-1918, No. 16, July 5, 1918), petitioner has extralateral rights upon the

Crescent fissure vein even if it be true, *which we do not concede*, that it must be presumed that there is in each of said claims a vein or lode running parallel to the side lines thereof.

In the case above cited this Honorable Court says:

“What in mining cases is termed the ‘extralateral right,’ is a creation of the mining laws of Congress, and to learn what it is we must look to them rather than to some system of law to which it is a stranger. Besides, as Congress has plenary power over the disposal of the mineral-bearing public lands, it rests with it to say to what extent, if at all, the right to pursue veins on their downward course into the earth shall pass to and be reserved for those to whom it grants possessory or other titles in such lands. What it has said is this (Rev. Stat. Sec. 2322, Comp. Stat. 1916, Sec. 4618):

‘The locators of all mining locations • • • on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, • • • shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges.’

“It will be seen that the extralateral right so created is subject to three limitations. One conditions

it on the presence of the top or apex inside the boundaries of the claim. Another restricts it to the dip or course downward, and so excludes the strike or onward course along the top or apex. And the last confines it to such outside parts as lie between the end lines continued outwardly in their own direction and extended vertically downward. But otherwise it is without limitation or exception and broadly includes 'all veins, lodes, and ledges throughout their entire depth'—one as much as another, and all whether they depart through one side line or the other. Given two veins which, in their descent, pass, one through one side line and the other through the other side line, how could it be held that the right applies to one vein and not to the other, when the statute says 'all veins * * * throughout their entire depth?' By what rule would a court be guided in making a selection between the two when the statute makes none? And where a single vein in its descent separates into two limbs which depart through the opposite side lines, on what theory could the right be sustained as to one limb and rejected as to the other? The terms of the statute, as we think, do not lend themselves to any such distinctions, but, on the contrary, show that none such is intended.

"In *Flagstaff Silver Min. Co. v. Tarbet*, 98 U. S. 463, 467, 25 L. Ed. 253, 254, 9 Mor. Min. Rep. 607, this court, in pointing out the intent of the statute, said that 'the end lines are to cross the lode and extend perpendicularly downwards, and to be continued in their own direction either way horizontally.' And in *Del Monte Min. & Mill Co. v. Last Chance Min. & Mill Co.*, 171 U. S. 55, 43 L. Ed. 72, 18 Sup. Ct. Rep. 895, 19 Mor. Min. Rep. 370, a case in which the statute was much considered, it was said, page 88:

'Every vein whose apex is within the vertical limits of his surface lines passes to him by virtue of his location. He is not limited to only those veins which extend from one end line to another, or from

one side line to another, or from one line of any kind to another, but he is entitled to every vein whose top or apex lies within his surface lines. Not only is he entitled to all veins whose apexes are within such limits, but he is entitled to them throughout their entire depth, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations.' In other words, given a vein whose apex is within his surface limits, he can pursue that vein as far as he pleases in its downward course outside the vertical side lines. And again, p. 89: 'The locator is given a right to pursue any vein whose apex is within his surface limits, on its dip outside the vertical side lines, but may not in such pursuit go beyond the vertical end lines.' In *Calhoun Gold Min Co. v. Ajax Gold Mining Co.*, 182 U. S. 499, 45 L. Ed. 1200, 21 Sup. Ct. Rep. 885, 21 Mor. Min. Rep. 381, it was added, p. 508: 'There are no exceptions to its language. The locators 'of any mineral veins, lode, or ledge' are given not only 'an exclusive right of possession, and enjoyment' of all the surface included within the lines of their locations, but "*of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically.*" A locator, therefore, is not confined to the vein upon which he based his location and upon which the discovery was made." And also, p. 509: "Blind veins are not excepted and we cannot except them. They are included in the description 'all veins,' and belong to the surface location."

It is true that this court points out that in the *Del Monte-Last Chance* case it is said that the locator may not in pursuit of the extralateral right "go beyond the vertical end lines," *but by this language is meant only that in the pursuit of the extralateral right the locator may not*

go beyond planes which at the surface mark and bound the length of the vein as claimed by him.

We do not find that the exact question has ever been decided by this court, but we submit that under the language of the statute, according to the spirit and meaning of it, there is no reason why extralateral rights should be confined to the so-called discovery vein (as indeed in the case last cited this court expressly decides); and that if, as decided by this court, the statute permits extralateral rights upon each of two parallel veins coursing with the side lines, one dipping through one side line, and the other dipping through the opposite side line, it seems equally clear that there should be no obstacle to the allowance of the extralateral right upon (1) a vein coursing parallel with the side lines, and also (2) upon a vein crossing the side lines and coursing substantially parallel with the end lines, the nominal end lines marking the limits within which the extralateral right may be enjoyed as to the first vein, and the actual side lines marking the limits, within which the dip rights may be enjoyed upon the second vein. This claim of an extralateral right through the side lines, on a vein coursing substantially parallel to the side lines, and an extralateral right upon a vein crossing the side lines and coursing substantially parallel to the nominal end lines, where two veins are found within one claim, far from doing any violence to the statute, is strictly within the terms of the statutory grant.

As this court says, quoting from *Calhoun Gold Mining Co. v. Ajax Gold Mining Company*, 182 U. S. 492:

"The locators of any mineral vein, lode or ledge are given not only an exclusive right of possession and enjoyment of all the surface included within the lines of their locations, but of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically."

It does not seem to us to be reasonable to say, in view of the decision of this court in the *Jim Butler Tonopah-West End Consolidated case*, *supra*, that if there is but one vein in a claim and it crosses at right angles the nominal side lines, so that as to such vein the side lines are the end lines, the locator may pursue this vein on its dip between planes drawn through the nominal side lines, throughout its entire depth, although such vein may so far depart from a perpendicular in its course downward as to extend outside planes drawn downward through the nominal end lines of the claim, but that he must in the pursuit of this vein to depth be prohibited from passing beyond a plane drawn downward vertically through the nominal end line of the claim, *if it happens that there is also found in his claim another vein striking through the claim upon a course substantially parallel to its side lines*. If there is any reason for such a limitation upon the locator's right in the pursuit of the vein which crosses his claim it has never been suggested.

As we think we have already pointed out in this discussion there seemed to be no question in the mind of the Court of Appeals of the existence of the extralateral right

upon a vein running substantially parallel to the located end lines and crossing the located side lines, provided such cross vein is proved to be the discovery vein. We take it that under the opinion of the Circuit Court of Appeals in this case the extralateral right would be confined under such circumstances to the cross vein, and be denied as to a vein running substantially parallel to the side lines. But this Honorable Court has now decided, we take it, (since the decision of the Court of Appeals in the case at bar), that the statute does not confine the extralateral right to the discovery vein, but grants it as to all veins which have their tops or apices within the lines of the location. This being so, and it once being admitted, (and we think it is upon authority abundantly established), that the locator does have extralateral rights upon a cross vein within planes drawn downward through the nominal side lines of the claim, extended indefinitely in their own direction, by what process of reasoning can the conclusion be established that this extralateral right upon a vein crossing the side lines of the claim, is limited to those cases where there is not found in the claim a vein coursing substantially parallel with its side lines?

As we interpret the case of *Jim Butler Tonopah Mining Co. v. West End Consolidated Mining Co.*, it definitely and positively disposes of the contention that the locator has less rights upon what has been called incidental veins than he has upon the so-called discovery vein. It directly disposes of the contention that extralateral rights may not be enjoyed upon more than one vein, and from the

logic of the decision we submit it clearly follows that extralateral rights will not be denied upon a particular vein within the location where all the elements of extralateral right are present, because extralateral rights do or may exist upon some other vein found within the claim; and it seems to follow logically also that extralateral rights upon a cross vein beyond the end line planes cannot justly be denied the locator because of the existence of an extralateral right by virtue of another vein through the side line planes, any more than he can justly be denied the right to follow a vein on its dip beyond the planes drawn downward vertically through one of the side lines, because there is in the claim (as in the *Jim Butler-West End* case) another vein which dips in the opposite direction and passes beyond a plane drawn through the opposite side line.

The policy of the statute is to promote the extraction of ore from the mineral lands of the United States. The contention upon which we insist, we think, is promotive of this policy. This Court has decided that the statute should receive a liberal construction in favor of the miner.

Suppose a claim 1500 feet in length and 600 feet wide to contain a vein or lode coursing from end to end parallel to the side lines, and another vein or lode crossing the first vein and coursing substantially parallel to the end lines of the claim, and the locator to make his discovery at the point of intersection of these two veins, would it be proposed to put him to his election as to the vein upon which he would assert the claim to the extralateral right? Such a proposition would be fan-

tastical. As long as the locator is confined in the extraction of ore upon the dip of his vein between parallel planes marking the length thereof at the surface and the top or apex of the vein upon which he claims the extralateral right is found within such parallel planes, no reason, we submit, can be suggested why he should not have extralateral rights upon every vein found within his location, whether the same upon its dip passes through side line or end line. Since no one else owns the vein at its top or apex, why should any one complain that the locator follows it upon its dip, confining himself always between planes which mark the limit of his vein at the surface—confining himself always within the end lines of the vein. This is the clear logic of the decisions which allow extralateral rights through the nominal end lines of the claim.

It was contended by respondent upon the trial and in the Court of Appeals (Record, No. 3977), that assuming that defendant was entitled to extralateral rights upon the Crescent fissure, the ore body in controversy was not part of that vein, but was a bedded vein without any known apex, and connected with no known fissure, and having indeed no known genesis. This contention of the respondent was rejected by Judge Marshall and was not discussed by the Court of Appeals. The following is our discussion of this point as contained in the brief of petitioner when appellee in the Court of Appeals upon the trial of the title. (Case No. 3977.) Although that brief will be sent up as part of the record, for the greater convenience of the Court we have concluded to embody in

the present brief our argument upon this subject before the Court of Appeals.

II.

Not only is there evidence to support the finding of the Court that the ore body in dispute is a part of the Crescent Fissure Vein, but that conclusion is in accordance with the clear preponderance of the testimony.

The course of the Crescent fissure is approximately N. 60 degrees east S. 60 degrees west, with a dip somewhat east of south. The course of the limestone strata through which this fissure cuts, is approximately east and west, with a dip slightly west of north, at an angle of approximately 20 degrees. The dip of the fissure, while not constant, varies but slightly and averages about 53 degrees. By underground workings this fissure has been developed upon its course or strike for half a mile or more.

Starting from the Constitution east and west drifts, near the surface, the fissure has been developed on its dip or downward course to the Elephant stope, a vertical distance of more than 1500 feet, or nearly 2000 feet on the plane of the dip, and extending westerly from the Aetna shaft 1000 feet or more, it has been developed on its dip for that entire distance to a depth of from 400 to more than 600 feet.

According to the contention of the defendant, this fissure throughout its entire length and depth, so far as developments have gone, is found to be a mineralized fissure, carrying ores of silver and lead, not always pay ore by any means, for long distances there is found in the fissure

low grade ore only, commercially valueless. At other places it contains high grade ore, of very considerable magnitude. In addition to this there has been found along the fissure, at different horizons, a number of comparatively flat ore bodies, having a dip northwesterly and conforming to the dip of the limestone beds. Each and every one of these flat, or bedded ore bodies connects with the fissure. The ore in the fissure continues unbroken and without interruption from the fissure out into the beds, for varying distances.

In no case is there any line of demarcation between the ore found in the fissure and that found in the beds, as to character or grade. In every instance also, the bedded ore deposit is found to have its greatest thickness where it is next the fissure, gradually decreasing as it extends into the beds.

All of these bedded deposits are found on the foot wall side of the fissure. In no instance has one been found making out into the beds on the hanging wall side.

In some cases the ore extends from the fissure into the beds but a few feet; in others it extends for distances varying from 10 to 30, 60, 125, and, in the case of the Elephant stope, which is the largest, to 150 feet, possibly somewhat in excess of that. In every case where one of these bedded ore deposits has been mined out, there has been found nothing, on either the top, sides or bottom of the cavity from which it was removed, except barren limestone. No connection is found between any one of the bedded deposits, and another, except by the fissure.

It is agreed between the experts for the respective par-

ties, that all the ores were deposited from heated waters flowing upward from some deep seated source, and carrying the metals and minerals in solution; that the bedded deposits are the result of metasomatic action, or a process of replacement by which, atom by atom, the country rock was dissolved and removed, and the same replaced with metals and minerals and thus were created the ore bodies as they exist today.

The contention on the part of the defendant is that these solutions flowed upward and circulated through the Crescent fissure, and that all the ore now found in the fissure, and in the beds, was precipitated or deposited therefrom; that thus is the fact accounted for, viz: that in every instance where a bedded ore body is found, we find continuous ore of the same grade and character in the fissure, extending, without interruption, into the beds.

On the other hand, it is contended by plaintiff that the Crescent fissure is a barren fault fissure; that it was not opened until after the deposition of all of the ore which has been found in the bedded deposits, and that the only ore found anywhere in the fissure, has fallen into or been dragged into it from some one of the bedded deposits and that where ore anywhere found in the fissure cannot be so accounted for, has in such instances, been dragged from some other ore bearing fissure which has not been discovered.

Plaintiff's experts give it as their opinion that none of the mineral bearing solutions found their channel through the Crescent fissure, but at the same time Mr.

Boehmer and Mr. Wilson admit, on cross-examination, that they have not been able to discover the channel through which they did flow.

The expert witnesses on plaintiff's side tell us that, while the extent of the displacement caused by the Crescent fault fissure has not yet been determined, yet the throw must have been 1000 feet or more, and that almost wholly in a downward course, the fault being what is called a normal fault, the country on the hanging wall side of the fissure having gone down that distance. If so, the limestone which is now found on the hanging wall side of the fissure never matched with the lime strata now found on the foot wall side, but was originally, or before the fault or throw, 1000 feet or more above the position it now occupies; the strata on the foot wall side therefore may differ widely in purity, texture, local fracturing and in other respects from the strata found now opposite, on the hanging wall side of the fissure, and hence more favorable to the disposition of ore.

The extent of the displacement of the country along the course of what plaintiff contends is the Crescent fault fissure, is of no moment. Some of the most valuable mines have been found in, and in connection with fault fissures. This is not disputed. The thing of moment is, whether the fault fissure, so called, was opened before or after the ores were deposited. Plaintiff's witnesses say, after; the defendants, before. It is admitted that if the fissure were opened before the deposition, and if the mineral bearing solutions from which the ores were thereafter deposited, found their channel through this fissure,

one would expect to find the ore making out from the fissure into the lime beds, at intervals, replacing them with ore, and we might expect that the conditions under these circumstances would be substantially as they are found today.

We cannot undertake to review the evidence in detail, without unduly extending the limits of this brief. We will here call attention only to what we deem the more important facts or features found in the testimony, respecting the true interpretation of which the experts for the respective parties widely differ.

At the outset we may call attention to the fact that many of the workings displayed on the maps Exhibit A and CC are now inaccessible, the work having been prosecuted many years ago before the defendant company acquired the several mining claims in which these works are found.

Mr. Charles P. Brooks, at page 178, testifies: that he is a civil and mining engineer, graduated in 1870, and has followed his profession actively and continuously ever since that time.

Being recalled, at page 95, he at page 97 states (referring to map Exhibit A): that all the work displayed upon it is platted from notes of survey made by himself, except such as were made by Mr. R. H. Brown; that he was the mining engineer of the Crescent Mining Company at the time when the work shown upon the map as the Aetna tunnel was driven. That the surveys were made by himself, with Mr. Brown. That he surveyed the greater part of the levels marked "Level No. 1" and

"Level No. 2," part of which was surveyed by Mr. Brown. That he has a list so that he can state with precision what part of the old workings of the Crescent were platted from notes made by his partner, Mr. Brown, and what from notes of his own. That he has his notes of the work made by the Crescent Company with which he kept up closely at the time they were working. That his notes do not always show the dimensions of the stopes, but where they are bounded by full lines, they are put in from actual measurements, and where not in full lines, they are platted from other outside information.

At page 97, referring to Exhibit CC, entitled "Projection on Vertical Plane Along Course of Crescent Fissure Vein, Looking Northerly," he says: that this map is a projection of the workings of the Crescent mine in what is known as the Crescent Fissure; that it includes the workings of the Aetna west drift down to the 400, and other workings that run from the Aetna west drift out as far as the Crescent drift, and also to the west, including the workings running from the Alliance tunnel through the Columbia raise and Constitution tunnel, near the surface. That the projection of the workings is upon a vertical plane; that the lines A-B on the map show where the section of the mine lying between plane A and plane B is projected on the cross section (Exhibit DD); that the stopes shown on Exhibit CC are colored blue; where they are in full lines, they are platted from actual measurements; that going west from the Aetna west drift there is a stope above the level put on from actual measurements. That the stope just west of the Mattison raise, marked

"Stope Along Raise," is also from actual measurement; so also the McGregor stope. That all the stoping above the Aetna tunnel west drift near raise 2, is from actual measurement and that it is *all in the fissure*. That the stope below the Aetna tunnel west drift and above level No. 1 is from actual measurement, and *is in the fissure*.

The stoping which the witness here refers to is shown upon the plan map, Exhibit A, and also upon the projection on the longitudinal section Exhibit CC. Referring to the latter, it will be seen that, starting at No. 1 level between stations 484 and 493, there is continuous stoping thence to the Aetna tunnel west drift, where, at station 437, and in the immediate vicinity thereof, this stoping connects with the Stephenson stope, which continues upward to Rich's drift, and there, with an interruption of a few feet only, would come to Rich's stope, and from there the stoping is continuous up to the Simpson drift; that all of the ore mined from this line of stoping stood in the fissure, is susceptible of mathematical demonstration.

Applying the scale to Exhibit A, it will be found that the stoping referred to at level No. 1 is 280 feet southerly (horizontal measurement) of the top of the stope at the Simpson drift. The vertical distance, by applying the scale to Exhibit CC, will be found to be 430 feet. The angle of dip, therefore, between the top and bottom of this stoping, is 57 degrees, and the distance on the dip of the vein is 512 feet.

If these maps are correct, it is manifest that this ore did not lie in the beds dipping northwesterly at an angle

of 15 or 20 degrees, but that all of it must have stood in the fissure.

The platting of this stoping on both these exhibits, was done from notes of survey made by Mr. Brooks and Mr. Brown, while the work of stoping was being done by the Crescent Company. The last work done by that company, and the last survey made by Mr. Brooks as its engineer, was in 1892, or nearly 20 years before this litigation commenced, and Mr. Brooks testified that he had with him the notes of the surveys so made by him and Mr. Brown. They were, of course, subject to the call and inspection of the plaintiff company's experts and engineers.

The height or thickness of the ore from the Simpson drift down to the Aetna west drift is shown in many places on Exhibit SS. Nowhere does its thickness exceed ten feet, and from that down to less than three feet. (It will be important, as well as interesting, to note how Messrs. Boehmer and Wilson, witnesses for plaintiff, endeavor to account for and explain the existence of this large ore body, and to reconcile its presence with their contention ~~that~~ this fissure is but a barren fault fissure; that it was not the channel through which *any* of the metal bearing solutions found their way from the deep.

The witness Brooks, continuing, testified:

That the Baskin stope lying above level No. 2 is put on from actual measurement, and *is partly in the beds, and in the fissure.* That it extends out in the beds about 100 feet from the fissure. That the ore body lies conformably to the beds, where it is in the beds. That the stope between stations 680 and 616 on the 400 level, are

from actual measurement. That this ore *is found principally in the fissure*, and that he does not remember any of it in the beds; did not make any measurement of any ore in the beds at all (meaning at this place); that he knows nothing about this stope except what Mr. Dailey told him. (The witness is here referring to that portion of this stope which lies below the 400 level and above the K-K level No. 1 and marked "Stoping unsurveyed.") That the stope shown on the map above what is marked "Level No. 3" near Mahoney's raise, and in which stope is found station "633" and the word "stope" are put on from actual measurement, and that *the ore there was in the fissure*.

That in the working marked "Level No. 2," and shown on this section, extending westerly from the Aetna raise, the two stopes indicated, one above and one below the level, with the word "stope" found in each of them, are put on from actual measurement, and the *ore there was in the fissure*. That in the work shown on Exhibit CC, below the Constitution drift northeast, the piece of work marked "drift" connected with which a small stope is indicated, the stope was put on from actual measurement, and the *ore was there in the fissure*.

At page 98 the witness also described the map, Exhibit DD. The scale of all these maps, Exhibits A, CC and DD, is 50 feet to the inch.

On Exhibit FF are shown several cross sections taken through the Baskin stope, and are intended to show how the ore occurred in that chute, viz: both in the fissure,

and making out therefrom into the beds and continuing upward in the fissure above the bedded ore.

Charles H. Gitsch, a witness called for the defendant, at page 67, at page 68 testifies: that he has examined the map Exhibit A; that he recognizes the Aetna tunnel (which is within a few hundred feet of the east end of the Boss claim shown on the map); that the Aetna west drift was started in the spring of 1887 when he was foreman. That the Aetna tunnel struck the vein a little southerly of what is called the Boss tunnel level; found there waste and low grade iron. The vein there was 105 feet wide; that they called it a fissure; its width was from 50 to 105 feet on the Aetna tunnel. That he drove the west drift through to a connection with the Apex winze; that they had ore all the way from the Aetna tunnel; it was in pockets in the fissure. They had more or less low grade ore all the way, and struck a higher grade of ore near station 547, 325 ounces. That there were two verticals there about 2 inches thick and a filling between the two, and then another with practically the same grade of ore, with a lower grade between the two verticals. That they went along the Aetna No. 2 (level), started off a cross cut about station 504; that they went in the fissure. It was lead and sulphur ore. Made this cross cut at about 20 feet of the letter B in Baskin; that he did work easterly of where the Aetna west drift connects with the Aetna tunnel about 200 feet. This was in the fissure, low grade, and at the place marked "Raise," about an inch and a half east of station 394 (on Exhibit A) the ore was better, that the raise went up in the ore. That he did work in

cross cut No. 1 near station 408½, (this station is found in Exhibit A about 60 feet west of the workings marked "Mattison's raise.") This cross cut he ran about 27 feet, took a vertical and struck the lime there in the face of the cross cut. Struck ore about 3 feet out from the bottom of a vertical winze, a small pocket; started out on that, it opened up into a kind of flat stope in the limestone; there were two stopes in the limestone, one above the other. That they were about 22 feet apart. (This refers to the McGregor stope, shown upon Exhibit A, and also on Exhibit CC.) Part of the McGregor stope was worked out while he was foreman, the northerly portion. There was still ore there when he left, about 3 feet in thickness. That the flat stope below was worked out. That this extended about 60 feet from the fissure out into the lime. That westerly along the drift that ore body extended about 40 feet, and averaged about 4 feet in thickness. When it was worked out they found barren lime in close proximity to the ore, also small fissures running from the main fissure to the ore body. There were cracks and crevices, some of which you could see, and some pinching right out; *that the ore in the McGregor stope connected with the ore in the fissure above the level about 30 feet; that the stope beneath also connected with the ore in the fissure.* That then they went into the Aetna tunnel and started to raise up between stations 429½ and station —. There was a flat stope. That they went up about 165 feet in the fissure on low grade ore all the way, with small bunches and pockets of ore throughout the entire length. When they got up that distance, they started

to drift both north and south, at Pete's drift. After they ran out a ways, they struck quite a large stope, that the ore was not over three or four feet thick, was high grade, solid galena. That the ore body extended from the Aetna west drift up directly to what is marked "Simpson's Drift;" that afterwards they ran another raise up there and struck ore; that the raise from station 429-N was all run in low grade ore in the fissure. That the ore body was worked throughout to its top from Pete's drift, and extended in an easterly and westerly direction for about 160 to 170 feet, and averaged about two feet of fine galena, *within the fissure*. That the level was driven in the fissure all the way, had ore all the way, some low grade and some first class. That he sunk the Aetna incline shaft 225 feet to No. 2 level. It went down in the fissure. They had little bunches of ore leading out from the shaft and quartz and vein material. When we got down to No. 2 level, we went out in a westerly direction about 246 feet in the fissure in low grade ore all the way; that at station 445 F they started to raise up on ore in the fissure.

At page 70 he testified that he had been in level No. 4 (the Hanauer tunnel) in the last few weeks, was there five days making an examination in company with Mr. Wiley and others. Examined it easterly from a point a little west from the Columbia raise. At the various places sampled there was some low grade ore, and some possibly shipping ore. That the drift shows more or less stoping all the way along, an old drift, made some years ago.

On cross-examination at page 71 he testifies: "Sometimes I speak of the vein and sometimes of the fissure.

I make no distinction here. I used to sometimes speak of the vein, and sometimes of the fissure. They are one and the same. That is the way we made use of them when I was working there. We made a distinction between the fissure and the bedded vein, and drew a sharp distinction between them. I am not an expert and can't state any more clearly than I have what composed the vein, only I know it is vein material in the fissure, or in the vein."

(Referring to this statement of the witness, it is said in the brief on behalf of plaintiff, that "it is thereby shown that the practical miner recognizes clearly a distinction between a bedded vein and a fissure vein, or the ore in a fissure." Of course no one, whether miner or not, could fail to recognize when the ore stood in a fissure, having a dip of more than 50 degrees to the south-east, and when it lay in the beds, with a northwesterly dip of 20 degrees, but we submit that no practical and intelligent miner, finding a continuous body of ore, partly in the fissure and partly in the beds, could come to any other conclusion than that all of it was a part of his vein; and that this was the understanding of the witness is shown by his testimony, pages 73-4. On cross-examination, where he says "Next at a point at the letter 'B' in Baskin we found a vertical, with some lead ore in it. It was high grade but small. We ran off that about 40 feet and got that same streak of ore; we ran away from the vein, but did not get outside the limits of it; that is to say, we had not yet got into that part of the

country which was not mineralized, and which I recognized as the foot wall of the vein.”)

At page 74 (on cross) the witness says: they started raise No. 2 from the Aetna drift and went out 165 feet; they were following ore in the fissure, not in the vertical, but in the main fissure of the vein. “We got a little better indications up here, so we started a level across so we got into this stope, and we ran this level No. 2 and raised up in this part on ore. I am now speaking of the west end of the Armstrong drift.” On level No. 2, going westerly from the shaft the first indication of ore was very close to the shaft, it was right in the fissure, and then right in the northeast corner of the station we stoped a little ore in the fissure. * * * The McGregor stope was imbedded in the lime bed. Those in the Pete’s drift and Chute drift were not, they stood up at about the same pitch as the fissure, at about 68 degrees.

James B. Kearns, a witness for defendant, at page 101 testifies: that he has been engaged in mining about 28 years; that he was in the employ of the Crescent Mining Company about 1887 or 1888, first as miner and afterwards as shift boss, for two or three years. That when he went there as shift boss the No. 2 drift had been driven out 350 or 400 feet; that while he was there it was driven about 400 feet, to about 50 or 75 feet from the Apex winze; that the level was driven on vein matter on the fissure. The vein matter is quartz, ore, porphyry all crushed up. That they had carbonate and galena ore in the level as it was driven along in the vein, as far as they drove it. That there was ore all the way along that line—could rec-

ognize it by the eye without having an assay made; some ore was saved, sent to the mill and shipped. That after running the No. 2 level they came back and raised on ore up the No. 2 chute to the Baskin stope. The chute started in ore on the level. About 15 or 20 feet up they encountered a flat ore body. The ore taken out of the chute was merchantable ore, it was all shipping ore, it was in the fissure. That he put up four raises, or chutes * * * *all of these chutes went up in the ore in the fissure. It was all shipping ore, first class ore, it was saved and marketed.* That the flat ore body which they got 15 or 20 feet up the chute, extended about 100 or 125 feet in the beds. It was about 6 feet thick, and came down to as low as a foot thick before it gave out in the bottom. It was dipping along in the lime beds. That the ore in the beds was connected and commingled with the ore in the fissure; they followed it from the fissure right out into the lime beds at the west end, along the level in an easterly direction, they stoped it out about 250 feet. They had lime above the flat ore body, barren lime, also lime beneath it, lime at the northerly terminus of the ore body and at the east end of it. The ore taken from the flat stope was merchantable ore. It cut off quickly in the lime.

M. J. Dailey, called for defendant, at page 105, testifies: That some of the work in the Hanauer tunnel (No. 4 level) was done under him; that this was in 1902. That he extended it further west for 1000 or 1100 feet; it was driven in the Crescent fissure a greater part of the distance * * * that in driving the level they encountered high grade ore along about station 2959. That it was

in the fissure where they encountered the ore, they had it to along about station 557. West of that they had no pay ore on the level. That they got ore near the Apex raise, and continued on the level westerly from 100 to 150 feet, at station 684. The ore was saved. The ore in the westerly portion was in the fissure.

Speaking of the Apex raise, they had low grade ore in the raise all the way up above the 400 level, that they encountered a flat ore body made out into the beds which joined with the ore in the fissure. That there was no difference in the appearance or grade of the ore in the beds from that in the fissure. About one-tenth would be shipping ore, and the balance milling ore, in the fissure and in the beds both. At different places where the ore was found making out into the beds, its farthest point would not exceed 20 or 25 feet. That it was hard to say at all times whether it was a bedded deposit, or just a swell in the vein of ore. The ore that lay in the bed would be from 15 to 20 feet in thickness, down to nothing. That he mined all the pay ore. That in the roof above the flat ore body was barren limestone, and the same beneath the flat ore body. He didn't observe any fissure in the roof in the limestone over it, or in the limestone beneath it. That they stoped below this level and opened a bedded deposit probably 50 feet below the level. Until they got down 50 feet the ore was in the fissure, and then made out into the beds. There was continuous ore from the stope above the level, to the stope below the level. That he gave Mr. Brooks the size of the stope below the 400 level. That he had examined

the same as platted upon Exhibit "A" and in his judgment the outlines of the stope are approximately correct as there shown. * * * That he ran westerly from south of Station 676 past 677 to the westerly face as shown on the map. That this was run on the fissure and they had continuous ore in the drift, with some shipping ore. That he ran the KK level to Station 670, past 671, into its westerly face. That this was run on the fissure. They had vein matter and ore continuously, and some shipping ore; that there was a little stope out near the easterly end of the KK level No. 1, easterly of Station 2714; that the stoping was in the fissure. That the stoping lying above, and apparently connected with level No. 3 between Reimer's raise and the Apex raise was both in the fissure and in the beds, above the levels. The flat ore body extended not to exceed 25 or 30 feet along there into the beds. It was overlaid and underlaid with barren limestone. Didn't see any fissure in the roof or bottom of the ore body. That the level marked No. 3 was run on the Crescent fissure, and had ore continuously in the drift. That in all places where he has spoken of where ore was found in the beds and fissure, too, the ore in the beds and in the fissure connected. That there was not any difference between the ore in the fissure and that in the beds, as to grade and character. * * *

That he did stoping from the 400 level, in the vicinity of the Aetna shaft between stations 1904 and 1906; started at station 528 and stoped up to No. 3 level. That the ore there was taken entirely from the fissure; that it was very regular and small, not to exceed 15 or 20 feet at

most, in an eastern and western direction, and was in ore all the distance between the two levels, some milling and some shipping ore. * * *

He testifies, at page 107, that he made a raise above the No. 3 level east of the Aetna shaft. It is marked "Raise." This raise went up in the fissure, crushed material, ore and vein matter. That there is a raise shown on Exhibit CC marked "Unsurveyed," which runs from the No. 3 level up to above the No. 2. That he put that raise up and extended it 160 or 170 feet above the No. 3 level. Went up on the fissure, and there was ore in the fissure continuously all the way, bunches of shipping ore, and the balance low grade. That he started to raise from Elephant Stope, which is found at the bottom of the Columbia raise, and extended it upward 60 to 80 feet, for that distance it was in the Crescent fissure. They had ore all the way going up, some high grade, as well as low grade. On cross-examination, page 109, he says: "When I speak of the thickness of the ore, I mean the greatest thickness in these bedded deposits. I found the greatest thickness on those bedded deposits close to the fissure, right up against the fissure, and extending out into the beds. This is so in every case. The greatest thickness was in conjunction with the fissure."

Mr. George D. Blood, at page 117 testifies that the present work, continuing from the foot of Reimer's raise on to No. 4 level, they go to the west a distance of some 60 feet on the fissure, and about 6 feet westerly from station 2960 the ore is shown *in place* in the fissure for a distance of about 20 feet; beyond that the ore shows in the fissure.

The ore as shown at 6 feet west from station 2960, is a narrow seam, "I should say not more than an inch of rather good galena" • • • that is in place. It is perfectly solid and could not have been dragged in. That is true of every place.

And on the same page he testifies to an exposure of ore of the full height of a drift which is in the fissure and in place, a solid mass of galena and zinc blende.

At page 118 he testifies: At the second level of the KK, a cross-cut is driven northerly and encounters the Crescent fissure at about 10 feet from the raise. On Exhibit "A" the work shown between stations 676-C and 676-B is on the foot wall of the Crescent fissure. "It is in the fissure and shows ore, did show ore when we drove it. • • • The face of the ore as we drove the drift came from the northerly top corner of the drift, to the southerly floor of it, banded across the face of the drift as we went through it. • • • The ore was all in the fissure."

At pages 119-20 he testifies that as they came down the Columbia raise from the point mentioned, the raise is deeper in the vein, it gets into the foot wall and under the hanging wall of the vein and there the ore shows conforming to the fissure, solid, and it could not have been dragged into the fissure.

At page 120 he testifies that at station 2612, at the junction of two cross-cuts with the drifts, the Crescent vein shows, going on its strike to the west, and continuing into the solid country, which we did not explore. There is a streak that is sloughed off, about 6 inches in thickness, conformable with the fissure and soft mud. The

hanging wall of that soft streak was perfectly solid, showing the galena, and carrying values in copper and silver, and is in place, the wall of that conforming to the fissure.

Also on page 120: Drift C is driven out from the Columbia raise into the foot wall of the soft streak, and at station 2581-0 the drift is turned to cut into the streak. It cuts the streak at Station b and gets to ore in place. The drift was driven westerly from that point about 60 feet, I think in all about 80 feet, drifting on the level of Drift C. The face of that drift is still in ore, and the ore lies there conformably to the fissure.

At page 131: Drift B is a very short working, probably 5 feet only in the vein, and there is in the hanging wall raise at that point a showing of the soft material I have described as shown again in Drift C and the Engine drift. There is an ore occurrence conformable with the fissure all up and down the raise from that station, or Drift B to the Custer drift, and in the face of the Custer drift, of which a sample was taken, being in place, solid crystalline material, and especially hard on the hanging wall side of that working.

At pages 121-2 he testifies: My examination of the Hanauer tunnel, easterly from the Aetna shaft, extended to a point about 60 feet east of station 408. "I am able to state that there is an ore occurrence conformable to the fissure, in the fissure, and in place. There is both galena and carbonate ore showing there and the banded structure—a banded structure also shown at a working

called the Raise, about 10 or 12 feet westerly from the station at the bottom of the Aetna shaft on the No. 4 level. The raise going up, or the chute going up, conformed to the fissure at that place. • • • Westerly from the Aetna shaft the sample map will show that, in company with others, I have taken samples for the whole extent, to 26 feet westerly of station 2960."

At page 122 he testifies that the ore in the Crescent fissure connects with the ore in the beds of the Elephant stope at a chute designated on Exhibit "A" as "Chute," and at the top is marked with an elevation of 899.3.

(See also the testimony of Mr. Wiley as to the vein and ore found in the Hanauer tunnel westerly from the foot of the Reimer raise, pages 134 to 136, and at pages 142 to 144 will be found a description of samples of ore taken from this tunnel.)

At page 139, speaking of sample No. 17, which he produced, he says it is from the Elephant stope and the Crescent fissure, too.

"That it is at a point where the ore which lies back of the fissure in the beds, commingled with the ore in the fissure itself, so that, at this particular spot, I could not say whether this is out of the bed or out of the fissure, because it is really out of both."

At page 136 he testifies (referring to Exhibit CC), in the KK No. 1 level there was ore having the direction of the fissure and plainly to be seen, and also in the drift there is nearly solid galena, which has the structure of the vein. We have both—a mingling—and this is the case where this ore, having the direction of the beds, is entirely

within the Crescent fissure, as it extends down, and is distinct, if you wish to make that distinction, from the Crescent vein, which encloses the bedded vein. So that we have, in that case, both ore having the direction of the vein and ore having the direction of the fissure. All within the fissure. And the occurrences above here, all have the direction, so far as I can tell, of the fissure.

(We invite special attention to the testimony of this witness, where will be found, on pages 127-151, a clear and comprehensive statement of all the observable facts and his deductions therefrom.)

As further reflecting upon the presence of ore in the Crescent fissure, we direct attention to the assay results of samples taken by Messrs. Wiley, Blood and Johnson throughout the line of workings connecting the Elephant stope with the Constitution east and west drifts, and along the No. 4, or Hanauer level, from the Columbia raise easterly, to and beyond the Aetna shaft. Each of these samples was numbered when taken. All of them were assayed, and the place from which each was taken is indicated¹⁰⁰ by a corresponding number, and the value thereof, as determined by assay shown upon the sample maps, Defendants' Exhibit LL and MM. There being no controversy in the evidence respecting these matters, it will be sufficient to refer to these sample maps, from which it may be seen at a glance where each sample was taken, and what its value was. Some of them are seen to be valueless, looked at from a commercial standpoint, but most of them, we believe, show ore of a grade that would be milling ore, while many of them show high grade ore.

Note particularly the following samples, taken up the Columbia raise, for a distance of 300 feet from the bottom thereof, this raise being confessedly in the Crescent fissure:

No. 52, about 90 feet up, showed 198 ozs. silver and 46.6 per cent lead.

No. 105, about 50 feet further up, yielded 140.44 ozs. silver and 36.66 per cent lead.

No. 106, about 50 feet further up, yielded 57.20 ozs. silver and 13.67 per cent lead.

No. 50, taken from drift C, yielded 22.60 ozs. silver and .30 per cent lead.

No. 49, taken from the Engine drift, yielded 48.80 ozs. silver and 5.97 per cent lead.

See sample map, Exhibit MM.

Reference to the sample maps, Exhibits LL and MM, will show that between the Engine drift and the Constitution tunnel, there were many samples which show a good grade of milling ore, and some of them high grade ore. This is true, also, of the samples taken throughout the Hanauer tunnel, as can be seen by reference to Exhibit MM.

The workings displayed upon the map, Exhibit A, show that from the beginning to the present every miner, or mining man who had charge of development, recognized and believed that this was a fissure vein. Level after level has been driven on it for long distances; a great many raises have been made and winzes sunk following the fissure in its upward and downward course, and by

this method of exploration or development every ore body so far known has been discovered.

It is truly said in *Carson City G. & S. Mining Co. v. North Star Mining Co.*, 73 Federal, page 601:

"The workings of a mine made in mining operations, and not in support of litigation, are generally important as evidence of any facts which may be legitimately inferred from them."

Now, as we have said, the contention on the part of the plaintiff is that the Crescent fissure was opened after all the ores had been deposited—that it is but a barren fault fissure.

Mr. Boehmer, a witness for plaintiff, on direct, page 170, testifies:

"Now, this ore, this vein, having no ore within it except where it has cut some other veins—it is rather difficult to find any ore there where you can get any assay value, but some of it has filtered down, migrated from one place to another. So that assays can be had in certain places, if you know how to look for them, but if you take the general course of samples in an unbiased way, you will get nothing out of that mud—it is nothing but mud that fills that fissure, except in places where the ore is dragged into it. I would conclude, as I have described, that the fissure veins and ore beds in this district existed first; that later the mountains were lifted and a fault occurred, and that this is one of the master faults of the district, which cut through the mountain indiscriminately and went along the line of the porphyry dike, which was the line of weakness, that it did not follow it exactly

under the porphyry or over it, but slashed through it wherever it bellied out, and that is where we find ore dragged into that fissure. • • • In the same way the fault fissure that has never been mineralized, only ore been dragged into it, should not be properly called a vein, but if it is called a vein, it is certainly of later age, and entirely distinct in the character of its filling from the bedded ore, which must, in my opinion, be called a separate vein."

At page 172, on cross-examination, he testifies:

"In my conclusion at which I have arrived, in this Crescent fissure there is no ore at all except what has been dragged in, or which has come there by infiltration and leaching down from the upper levels."

At page of the Supplemental Transcript, he testifies:

"I am in accord with the theory that the ore is deposited from solutions coming from some deep-seated source, and whether it be in the form of a deposit, whether bedded or otherwise, there must have been some avenue, whether discoverable or not, through which the solutions could have come—that is my judgment. If the waters had come up the fissure, they may go into the limestone beds. Whether they did or not, we do not know, but there is a channel there formed by that fissure" (meaning the Crescent fissure) "through which the ascending solutions could have come and mineralized the fissure, wherever it is mineralized, that is, if the fissure existed when the mineral solutions came up, but there was no channel at

that time, to my knowledge; that fissure was not there before mineralization."

At page 173 he testifies:

"I have not found any fissure through which I believe the solutions flowed which deposited the ore which is now found in the Crescent fissure, or in the beds. I would not point my finger to the one that brought the solutions into the bed. I have not found the one through which, in my judgment, the solution flowed. I think it is absurd to look for the one fissure which created all the ore in that place. It is impossible to determine the exact source from which those ores were brought up. *Each separate lime bed would furnish a separate, distinct vein.*"

At page 172 he testifies:

"There is a recognized process of deposition, known as replacement. Replacement of the country rock is a substitution of one particle for another of the original country rock by mineral. That occurs not only in the beds, but it occurs also in the fissures, in any rock, most particularly, though, in the limestone, because it is the more soluble and more easily altered. I found in the Elephant stope no evidence whatsoever that indicated to my mind that any of the ores were formed by mineral solutions which came from the Crescent fissure. They were practically butting against the Crescent fissure and the limestone ore beds, but not vertical, so far as any evidence was shown."

At page of the Supplemental Transcript, he testifies:

"Going to the Elephant stope, I was unable there to dis-

cover the fissure to which the ore there found is referable. I found a number of fissures, but I would not refer to one of them as the source of the ore. • • • The ore in the Elephant stope makes back to the Crescent fissure. I don't know whether there is any ore in the fissure there, or not. I wasn't able to discover it further because of the lagging or timber. *I didn't ask to have the lagging or timber removed to see whether the ore made there in the fissure or not—I didn't think it important.*"

At page of the Supplemental Transcript, he testifies:

"There are a number of places where it can be plainly seen that ore has been dragged into the fissure. It was more plainly to be seen in the K-K level No. 1, shown on my section Exhibit 11, left-hand section. This little square painted brown represents the end of the drift, which shows ore bodies in that particular relation and condition. • • • The ore bodies were in the square that represents the end of the section of the drift or in the beds. I found drag ore in the fissure in all places where the developments were made below the K-K level No. 1—there is ore that stands against the fissure. I don't know exactly what you mean when you speak of 'within the fissure'—you mean surrounded by clay?"

Q. No, I mean within the limits of the fissure, its northerly and southerly limit, within the width of the fissure, where have you found drag ore?

A. Why, I have seen it at all points where the devel-

opments were made along that Long raise, the beds were dragged with the ore into the fissure.

Q. Now, would you point us to some place where you saw drag ore in the fissure?

A. It depends on the limits of the fissure. I call the limits of the fissure mud. I have found drag ore in the fissure at that particular drift that I am now pointing to in Section 11—that is drag ore."

But on page, Supplemental Transcript, speaking of the same place, he says: "*If this ore had been deposited where you find it today, by solutions, the channel of which was up through what you call the fault fissure, you would have just such a picture as we have here, without any material difference, under this condition.*"

And on cross-examination, page, Supplemental Transcript, the following is found:

"Q. We will assume, Mr. Boehmer, that the stope to which I now point, on Exhibit CC, is a stope in the limestone, the bed rock of the country, and that the ore in that stope connects, without any interruption, with the ore in the Crescent fissure, having continuous ore in the fissure, and making off, without interruption, into the lime beds, and, in addition to that, we had where I now point, a chute going up between stations 408 and 529, marked 'chute,' going up from the 400 level to the 300 level; that there you had a width of ore 5 or 6 feet, part of it shipping ore and the balance milling ore, all standing in what is called the Crescent fissure; that from raise No. 3 we had ore standing in the Crescent fissure, making in the Crescent fissure, and extending therefrom a short distance

into the lime bed, depositing and forming there an ore body conformable to the dip and strike of the lime beds, and coming along the level No. 2 you knew that the stope shown upon the map to be Baskin stope extends for 200 feet or more along the strike of the Crescent fissure, making out into the beds for 100 or 125 feet from the fissure; and that that bedded ore body came back not only to a junction with the Crescent fissure, but all along that length where it was conformable to the strike of the fissure, there was ore standing in the fissure, merchantable ore—

A. Yes, sir—

Q. —and that then going above the level No. 1 in a stope—No. 4 chute being in the stope,—on up to the Aetna tunnel level, and then on up to the Stephenson stope, on up into Rich's stope, then up into a higher stope, and up to Mike's drift, and then continuous ore up to Pete's drift, and then from Pete's drift up to the level of the Simpson drift, of a magnitude in length along the fissure as shown by the stope that is platted there, and that the ore, all of it, stood in the Crescent fissure, and that then, going back easterly we have the McGregor stope a little above the Aetna tunnel level * * * and about 25 feet beneath that is another stope, both the McGregor stope and the one beneath it being in the beds and making out and connecting with the ore in the Crescent fissure—wouldn't you be inclined, if you knew those to be the facts, to change your opinion, that this Crescent fissure was not a vein at all, and never was the source of mineralization?

A. I think not, because the demonstration under

ground which I have seen positively—I never examined those workings particularly—but your own sections show that every body of ore in the fissure is connected with the flat ore body, and that it is all drag ore.

Q. Now, I am asking you to assume that these stopes which I have called attention to as displayed upon Exhibit CC, are as I have stated—would you still be of the opinion that the Crescent fissure was not the source of the mineralization?

A. I would, indeed.

Q. You would think it had nothing to do with the deposition of the ore found in that fissure?

A. I would, decidedly. The Crescent fissure is a persistent and very large fissure."

And at page...of the Supplemental Transcript, he testifies:

"If I assume that this ore running from the Simpson drift, as shown in the stope, is continuous down to the No. 1 level; that that ore varies in thickness from $3\frac{1}{2}$ to 5 feet, the greatest thickness ten feet, and that it stands in the fissure and is unbroken, I would still say that it was not referable to the Crescent fissure, because I know that at the top of the hill there were large flat ore bodies which must have dropped into it, and possibly dropped that down there for a distance on the plane of the dip of probably 500 or 600 feet, and left it standing there *solid and unbroken*. I would still say that it was not referable to the Crescent fissure. It is my judgment that the ore now found in this line of work from the Simpson drift, with its continuous stope down to No. 1 level, is to be

accounted for by the fact that it was dragged in there from a flat ore body which once extended out further west than the Buckey stope, and from other horizons which show in the sections."

(This shows the length to which the witness was required to go to support the contention that there was no ore in the Crescent fissure except drag ore; that no mineralized solutions ever flowed through it. There is no ore body extending westerly of the Buckey stope. If there ever were any, it has been carried away by erosion.)

On direct, at page 170 of the record, referring to the Elephant stope, he says:

"There a large mass of ore has been mined which lies, with the stratification of the beds of the limestone, off to the north. That ore has been followed for 180 to 190 feet away from the fault, and wherever it can be examined now, there is no sample of ore in sight anywhere, it is all taken out. There is no sample of ore in sight at any of the breasts of the stope, but there is low grade ore at other places, and not only that spot of galena, but other minerals and also of limestone that is mineralized and changed into solid galena, keeping on its course on the dip away from the fissure here, if not carrying galena or low grade ore even, will be mineralized enough to be called a part of that ore body, and on its continuation open up again into ore possibly, as I have seen it,—not here in this case, but in a number of other camps, I mean to say that the ore beds, which is pay ore in one place and mineralized on its continuation, and then, going into ore again, is one continuous bed, called a bedded vein."

Mr. W. A. Wilson, a witness for plaintiff, testifies at page 211:

"On the assumption of the ore coming up, if this Crescent fissure had been the source of the mineralization, or the deposition of the ores found in the beds, I would expect it to be making off from the parent fissure." • • •

"I did not, nor do I now, consider the Crescent fissure open enough to have permitted, or to permit the solutions from the deep to ascend through that as a channel and deposit metallic contents in the beds, because this attrition material that I have referred to that forms the vein, would not permit the solutions to go in it, but prevent its going for any distance in the places where the limestone is hard and crystalline. There might be a good channel on the side of it, and immediately in contact with it in places, and usually that contact is this clay."

On page 212 he testifies: "Speaking of the Crescent fissure, I don't know the conditions back of the time when those solutions came up. This Crescent fissure might have been very tight. It is better to assume a sufficient opening to have permitted the circulation of the mineralizing solutions."

On page 215 he testifies: "My opinion as a geologist is that the ore found in these beds, the bedded ore bodies, is due to the ascending mineral solutions, and they must have had some channel connecting with the fissure, I think, or the zone of fissuring, or some way, and may be they came up partly through one fissure, and partly through another. I am unable to place them. I have not been able to find and determine in my own mind

through what channel the solutions came up which deposited these various ore bodies.

"Q. Now, assuming the fact to be, as testified by the other witnesses, that every one of the bedded ore bodies shown to the east of the plane B, connects with the Crescent fissure, and that there is continuous ore making out into the beds from the ore found in the fissure, and that when you come down to the Elephant stope you find the same phenomena, the ore in the beds coming out and in contact with the ore on the foot wall side of the Crescent fissure, would that have any tendency, in your opinion, to support the contention, or theory, that the Crescent fissure was the channel through which those solutions occurred?

A. I would want to see the occurrences of the ore there, and if it was similar to what has been spoken about last as the Elephant stope there, why, I would attribute it to the ore being dragged down, perhaps a section of ore, from a bedded vein. I am referring to the bedded ore. That was a section of the bedded ore taken out then by this fault fissure and dragged down and ground up and formed the ore in the fault fissure of the Crescent fissure. That would be my explanation of these ore bodies which we are talking about."

At page 216 he testifies that he does not know of any connection of the Elephant stope with the Crescent fissure, and the ore bodies of the Crescent, but he does not say what examination, if any, he made, to ascertain whether they did so connect or not.

At pages 218-19 he testified as follows:

“Q. I will ask you to assume, Mr. Wilson, that the ore shown on Exhibit CC as stoped, and as extending from the Level No. 1 up through the Stephenson stope, through Rich’s stope, through Mike’s drift, and then on up to Pete’s drift, and then on up the raise to practically the level of the Simpson drift, is all in this Crescent fissure; that it varies in thickness, as far as measurements have been made, from 3½ feet to 10 feet, none of that bedded, you would (then) think that ore was deposited from solutions flowing upward through the Crescent fissure?

A. If it is a mere assumption of that question, I would not know, that is, that longitudinal projection shows bedded stopes that make up that continuity, and because of that fact it is very different from where you are assuming that the fissure is filled with ore.

Q. It is in evidence that there is continuous ore, a continuous stope of ore through this fissure from No. 1 level up to the Simpson drift and not in the beds, and it is of a length, easterly and westerly, as shown upon Exhibit CC. Assuming that to be the fact, would you say, in your opinion, that it was drag ore and that it was not referable to any deposit through solutions that had flowed upward through this Crescent fissure?

A. I would do a great deal of thinking, not having seen that, to account for that occurrence. As far as my observation in the rest of the mine is concerned, I have found nothing like that. I think I would assume there must be a fissure vein carrying that in there, and *that has*

become entangled in the Crescent fissure, to account for that continuance here through these stopes, just as we have the other vein encountering the other fissure in the Constitution tunnel, and mineralizing it there.

Q. I say, if, notwithstanding you found a continuous (not) bedded body in the Crescent fissure, for the length easterly and westerly that this map shows, and for a distance upward and downward, as the map shows, all in the Crescent fissure, none of it in the beds, none of it in any other fissure, you would do a good deal of thinking before you came to the conclusion or the determination whether it had been deposited from ascending solutions which flowed through that fissure, would you?

A. Not if I had my knowledge of the Crescent fissure as I have of its appearance in other places.

Q. With all the knowledge that you have of the Crescent fissure in other places, you would say, would you, that this ore body here found in the Crescent fissure, and having a dip of 59 degrees, the dip of the fissure through that section, was not deposited from solutions which flowed through that fissure?

A. I would surely have to see such an occurrence as that in that fissure to come to a conclusion at all. I can see a fault fissure there that has cut ore bodies; it may have cut veins, it may have cut fissures carrying lead ores that might make this body you refer to, but I can't see any reason for that amount of ore in that fault fissure. The only way I could explain it is the bedded vein came there at shorter intervals and that made a continuous showing of ore down through these stopes."

At page 221 he testifies: "I did not go up the chute shown on Exhibit CC, which goes up near the bottom of the Aetna shaft from this Hanauer tunnel level, between stations 329 and 408—I probably heard the testimony introduced in behalf of the defendants to the effect that 800 or 1000 tons of ore had been taken out of that line of work in the fissure, and I assume that you are stating it correctly—but if there were the approximate tonnage stated, found there in the fissure, and extending from the Hanauer tunnel level to No. 3 level, I would not think that it had been dragged in, I would think that would be the intersection of another fissure with the Crescent fissure. In fact, the character of the filling there leads me to think there is another fissure in that vicinity. From my knowledge of the Crescent fissure, I would not conclude that the ore mentioned, though found in the Crescent fissure, and continuing in the Crescent fissure for that distance between these levels, was deposited from solutions that came from that fissure. I would figure, if there was that amount of ore, that there had been a practical union with a fissure that came from some other direction and joined with this. I didn't see a fissure there, but I saw a different character of material there in this portion of the mine, than I did in any other portion of the mine. It was very silicious quartz, and some manganese. This was in the vicinity of the Aetna shaft: I didn't find in the fissure, whether dragged in, or otherwise, ore that was very silicious. I believe that at the Aetna shaft is the only place where you can find quartz, except some places I found silica in the limestone."

(The witness was here shown sample 17, taken from the Elephant stope, of ore in the beds and in the Crescent fissure, and he states that it contains considerable quartz, probably more than 50 per cent.)

At page 223 he testifies: "This ore that I found differing in character, I think, originally came from outside of the fault fissure, and I think it was dragged in there, probably run from the fissure at that point. The fault fissure, in other words, intersected another vein. It is not a bedded vein there. I account for the occurrence of ore in the raise going up from the 400 to the 300 upon one of two assumptions: either that it was dragged in from some bedded ore body that lay at a higher level, or that it was deposited where it is found today from another fissure, which I have not found, although it is found in the Crescent fissure. I do not assume that it is from a bedded vein. I rather think that it was another fissure. . . .

I am assuming that it was not dragged in from any body of ore there at all; it was another vein came in. I wish to be understood that in my opinion it was dragged in from another fissure vein. I think, probably, the fissure was there and that the fault intersected the fissure, and dragged some of the fissure ore into the fault at that point."

At page 225 he testifies: "I am not able to point out to the court any bedded ore body which could account for all the ore found in the Crescent along the 400 level, to the extent which I have examined it easterly and westerly from the Aetna shaft and to raise No. 3, because I have not examined those workings. But, though I know of no

ore body or fissure which would account for it, yet my conclusion and opinion is that all the ore found along that distance was dragged in from some unknown source; however, the ore occurrence there is very meagre."

Both Mr. Wilson and Mr. Boehmer give as one of the chief reasons for their opinion that the fault fissure, so-called, was opened after the deposition of all the ores found, that they find the limestone and the ore in the lime beds, bent down toward the Crescent fissure. But if this fault fissure had been opened before the ore bodies were deposited, and the hanging wall side of the country dropped, it would have had the same effect, as to the bending of the beds, and if, thereafter, these beds were in places attacked by the circulating mineral solutions, they would be replaced with ore as readily as though they had never been bent.

At page 213 Mr. Wilson, on cross-examination, testifies:

"Q. If this fault fissure had occurred before the deposition of the ore now found in the fissure and in the beds, you would expect to find the beds bending downward and coming in contact with the fissure, just as you find them now?

A. I would expect the physical phenomena to be the same, with the exception of where these bodies that are in the bedded ore veins that are now cut by that fault fissure—they have been formed in many places by the deposition of the ore, and they are more bent down than they would be in the original limestone, forming the original deposition."

On further examination, the witness, at pages 213-15,

admits that the amount or extent of the bending is variable, as one would naturally expect it to be, and that he made no examination for the special purpose of ascertaining whether or no the beds were bent more where bedded ore bodies were found, than elsewhere along the course of the fissure. Both he and Mr. Boehmer testified that the beds, on the foot wall side of the fissure, in which the Elephant stope is found, are in their normal position.

See the testimony of Mr. Wilson on cross-examination, page 233, and of Mr. Boehmer, at page 169.

It appears that Mr. O. A. Palmer, who was called as a witness for the plaintiff, had never been in any of the workings westerly of the Aetna shaft until a few days before he was called to the witness stand, and it is also apparent from the short time he then spent in inspection, and the extent of territory which he covered, that his examination must have been a superficial one.

See on cross-examination, pages 245-7.

This witness also gave it as his opinion that the Crescent fissure found in the territory in controversy, is identical with the barren fault fissure found in the Ontario and Daly ground. See pages 242-3. He does not claim, however, that he ever traced, or attempted to trace it on the surface, and his observations underground were such that his opinion concerning this must be merely speculative and conjectural. At page 243, on direct, he testifies, referring to the fault fissure found in the Ontario and Daly:

"When you leave the Daly ground and go toward the Alliance, in which I think is identically the same fissure,

there is a space of ground undeveloped, and through that it is a matter of inference to a certain extent. Now, in the Anchor tunnel, it crosses there, then is picked up in the Alliance, but the distance between the Alliance and the Anchor is several hundred feet, and in that distance there is no development, and there it is a matter of conjecture as to it being one and the same, but in the absence of being able to fit any two together as having the same general conditions, the cross-cutting of the country in various places all indicate a series of fissures, such that we would be in doubt how to correlate them. I think there is little or no doubt left that it is identically the same fissure."

On cross-examination, at pages 247-8, he states:

"The distance from where you have what I call the Crescent fissure developed in the Ontario and Daly, over to where you find it in the Alliance tunnel at the Elephant stope, is about two miles.

Q. How far westerly of where you have it developed in the Ontario or the Daly is it before you have it developed again, what you believe to be the same thing?

A. The first development must be in the Anchor tunnel, about 400 or 500 feet from where I saw it in the Ontario or Daly from the Anchor tunnel to where we have what I believe to be the same fissure developed in the Alliance, would be, I think, *nearly 1000 feet*. That would be undeveloped ground."

Moreover, according to his description of the ore occurrences along or in the fault fissure found in the Ontario and Daly, there never was, on or along that fissure

any bedded ore bodies which connected with ore standing in place in the fissure. In this respect, therefore, it must be wholly unlike the Crescent fissure found in the territory here involved.

See on sur-rebuttal, on this particular matter, the testimony of Mr. Blood, at pages 249, *et seq.*

The testimony of Mr. Nichols Treweek, President of the plaintiff company, is found on pages 173-196. It is devoted chiefly to a description of work done by him, all of which was easterly of the Aetna shaft, and much of it far to the east thereof. Much of this work was done under his direction when he was representing the Sampson Mining Company, and the balance when he was directing the work of the Alliance Mining Company. This work was prosecuted during a period of seven or eight years, at a cost of several hundred thousand dollars. That which he did while representing the Sampson Company was done in search of the Crescent fissure, and after the same was found in driving for 1500 feet or more along the same, while that which was directed by him for the Alliance Company was so done, as he tells us, to keep in close touch with the Crescent fissure, that is to say, at frequent intervals he drove from the drift he was extending, cross-cuts to intercept the Crescent fissure, and all such cross-cuts ceased when the Crescent fissure was encountered. This work was all directed by him in the belief that the Crescent fissure was not merely a barren fault, but a fissure vein.

At page 187-8 he says: That about 12 years ago the Alliance Company conveyed its holdings to the prede-

cessor of the defendant company, and that then, of course, the work of the Alliance Company ceased, and that he did not prosecute it further, because he had not control. When he changed his opinion, or his belief, as to this being a fissure vein, we are not informed. For aught that appears in his testimony, he did not change his belief in this respect until after the defendant company had opened up the Elephant stope beneath the Conkling surface. In direct he testifies that in his opinion, the Crescent fissure played no part in the deposition of the ore found in the Elephant stope, but on cross-examination, pages 194-5, he says, referring to the Elephant stope, that he never requested the removal of any lagging along that portion of the Crescent fissure to see whether or not the ore in the beds makes back and connects with and commingles with the ore standing in the fissure.

(In the brief on behalf of appellant, reference is made to a bedded ore body, which it is claimed, extends for 1000 feet or more from the Crescent fissure. The bedded body here referred to lies on the opposite side of the hill, and trends in a northwesterly direction from the Buckey stope, as shown in a line of workings upon Exhibit GG, a part thereof being also shown on Exhibit A, and in which near the northwesterly extremity is shown on Exhibit A, workings marked "Rebellion Tunnel," "Johnson Tunnel," "Porphyry Drift," etc. But little reference was made to this ore body in the trial of the case. The ore there lies conformably to the dip of the beds from top to bottom. To what fissure the deposit of this ore is referable does not appear from the evidence, but that it

is cut by a fissure other than the Crescent fissure, and at almost right angles thereto, is the only inference to be drawn from the evidence of Mr. Wilson, as we will show.)

Mr. Brooks, at page 99, testifies:

"The workings on this map (Exhibit GG) have been surveyed by me and my firm and I have the notes of them. The general dip of the beds containing the Crescent ore body is a north northwesterly direction, a little west of north, and the general dip from the extreme northwest lower ore body, to the extreme southeasterly would be about 15 degrees, would be roughly, from the point marked 'Square set Stope' up to the stope along the Buckey tunnel, up 1000 feet, giving a difference in elevation of 275 feet, which would be about 15 degrees dip. That would approximate the general dip of the lime beds, as well."

And Mr. Wilson, at page 216, testifies: "I cannot say that the bodies on the other side of the hill are in a different vein from those dipping in an opposite direction, or that they are veins, of the same character as the Elephant stope, because there is a possibility that before the great erosion of the country these ore beds, the particular lime beds that the Crescent ore bodies are in may have made up the Crescent fissure. On the other side of the hill we have the bedded ore deposits coming up in a northwesterly direction at a dip conforming to the general dip of the lime beds throughout."

At page 217 he testified:

"Q. Wouldn't you say that the vein on the opposite side of the hill you refer to, which is conformable from

top to bottom with the dip of the beds for very long distances, while on this side of the hill we find bedded ore bodies, and that they lie in the ground, being deposited in such a way as to bring them always in contact with this fissure which dips at an angle of 55 or 60 degrees; wouldn't you say that the ore bodies found on the ground in controversy, bedded ore bodies, belonged to a vein somewhat distinct from the vein on the other side of the hill?

A. I could not say. The mineralization was different. I would say that they belong to separate ore bodies now, as we see them today.

Q. So, if I don't misunderstand you, the fact that these ore bodies, these bedded ore bodies, I mean, each and every one of them, found in juxtaposition with the Crescent fissure, and that in each and every instance you have the ore in the fissure, and ore in the beds, not separated at all, and notwithstanding you find that none of these ore bodies, no bedded ore body is in contact with another, would not influence your judgment one particle in determining whether or not the ores as found here, are referable to the Crescent fissure, or have any weight with you at all?

A. If you will permit me to answer the question, I think I can take it up probably the way you want me to. The important thing is these ore bodies in the fault fissure conform in a general way to the strike of the bed, so that it is what we call a strike fault. Naturally, bedded ore bodies cut by a fault of that kind, the bedded ore would show coming up the fault fissure. We can assume another

fault running to the northwesterly there through that country, and it would cut these bedded ore bodies just the same, but in a very different position, and under different conditions, and drag ore, and you would have the same occurrences with levels trending off there to the northwest, just as we have them to the northeast and southwest, the fault would be followed and the ore would be encountered on the dip of the ore beds instead of on their strike. So that the reason you have the ore beds coming up to this fault is because it is a strike fault, and, of course, naturally cuts the ore beds across them in the direction of the strike, and naturally it butts up against it. I think that explains the way you find this bedded ore butting up against the strike fault in that way, as I say, and assuming a northwest and northeast fault, then you have them butting up on their dip, and you have a different condition, but you would have the drag ore in the fault."

According to the testimony of the witnesses on behalf of defendant, along the line of works westerly from the Aetna shaft to and beyond the Columbia raise, there were at least 11 separate bedded ore deposits, some of them of very slight dimensions, each and every one of them is found in contact with the Crescent fissure, and in each and every one of them there is ore in the fissure, and extending therefrom unbroken into the beds, with no difference as to grade or character. Most of these ore bodies being now inaccessible, the experts on behalf of the plaintiff were asked to assume that the relation of each of these bedded ore deposits to this fissure was, as stated, and upon

such assumption, to state whether in their opinion the Crescent fissure was not the channel through which the solutions flowed, depositing the ore so found in the fissure and in the beds, and they answered that even upon such assumption, they would still be of the opinion that this fissure was but a barren fault and played no part in the deposition of the ores, notwithstanding they were unable to find any other fissure or channel of circulation which, in their opinion, accounted for the deposition. According to the opinion of Messrs. Boehmer and Wilson, the fact that each of the bedded ore deposits was so in contact with the fissure, was a mere coincidence, and had no tendency to show that the fissure was the source of mineralization.

To the layman, at least, it would seem that these gentlemen must be mistaken; that their interpretation of the facts is not the true one; that their conclusions are inadmissible, and must be rejected.

Finding each and all of these bedded deposits so in contact with the fissure and the ores therein, with continuous and unbroken ore from that in the fissure out into the beds, of like character and grade, the only reasonable conclusion to be drawn therefrom, we submit, is that the ore in the beds and that in the fissure was the product of the same creative forces; that the ore in the beds, as well as that in the fissure, was deposited during the same period of time, from solutions having the same source, carrying the same metallic content, and flowing upward, where not obstructed, through the Crescent fissure, which, with its subsidiary fracturing, was the channel of circulation. If there were differences in porosity, differences

in purity, differences in extent of fracturing of the foot wall country from place to place along the fissure, it would afford an explanation why the work of replacement, in some instances extended but a few feet in the foot wall of the fissure, in others 150 feet or more, and in other stretches of country along the foot wall of the fissure, there was no replacement of the country rock at all.

In "Types of Ore Bodies," edited by Mr. H. Foster Bain, there is a chapter by R. A. F. Penrose, Jr., on "Causes of Ore Shoots," in which is found a very satisfactory explanation of such irregularities. At page 333 the author states:

"Obstructions, as well as openings in a fissure may in some cases have an influence on the positions of ore shoots. Obstructions may occur where the walls are locally pressed tightly together, or where the fissure makes a curve or is faulted, or where the decay and rubbing of the walls produce clay selvage or gouge, which collects and forms obstacles, leaving other parts of the fissure open. Obstructions may also be formed in a fissure in vases where the gangue comes from a different source than the ore, perhaps from the adjacent rocks, and partly fills the fissure before ore is deposited in the remaining space. Obstructions may also occur where the fissure passes from a rock in which it has caused a pronounced break, to a more plastic rock in which it has had very little effect, or even has disappeared, as described on page 338. Any of these obstructions may influence the formation of ore shoots, by locally checking the speed of the ore-bearing solutions that come in contact with them, thus encouraging deposition, or by forcing them into other parts of the fissure not ob-

structed and thus confining deposition to circumscribed position, or by forcing them into the wall rock forming local accumulations of ore either by replacement or by filling interstices and cracks."

And in the same volume there is a chapter by Mr. J. D. Irving on "Replacement Ore Bodies," in which, at page 226, the writer says:

"The most important factor influencing the form of an ore-mass formed by replacement is the channel or opening which has admitted the ore-bearing solutions to the rock-mass which has been replaced. No substitution of ore for country rock can, of course, occur unless solutions have first been able to reach the rock susceptible to replacement. The openings which occur in rocks are of many different kinds, and it is possible for replacement to be initiated from any of them, irrespective of form or origin; joint-cracks, fissures, large faults, brecciated zones, horizontal spaces between separated strata, vesicular cavities, and inter-granular spaces serve equally well as starting points for this process. All of these forms of rock opening undoubtedly serve as initial points for replacement; but those which are of comparatively small size and are discontinuous have simply permitted the extension and easy penetration and mineralization of a susceptible rock-mass, and cannot be regarded as the conduits or main channels of access. To serve as adits or connections between susceptible rock-masses and deeper seated sources of mineralizing waters, cavities must be continuous for considerable distances. They must be 'trunk channels' of some kind. That a susceptible rock should be porous, open textured, brecciated or jointed, is an aid to mineralizers once they have reached the rock affected, but is insufficient in itself to afford access to mineralizers. It, therefore, happens that replacement ore bodies are generally found associated with some form of fissures in the country rock which are

either singly or collectively capable of conducting solutions from considerable distances to the locus of deposition. There are few, if any, instances with which I am familiar that do not permit either the actual observation of these fissures, or their inference from the form and distribution of the ore masses."

And at page 236 he says:

"Fully as important in determining the shape of replacement masses are the chemical character and structural arrangement of the enclosing rocks. Fissures do not occur exclusively in homogeneous rocks, or in rocks composed of grains of one mineral only. They frequently pass through rocks of widely varying lithologic character or rocks that, although as a whole homogeneous, are made up of aggregates of different minerals which have widely different susceptibilities to replacement processes."

As said by the learned judge before whom the case was tried, Transcript p. 261:

"In places the porphyry doubtless furnished a barrier to the permeating waters. Elsewhere it may be that the relation of direction of the fissure stress to the direction locally taken by the fissure along the plane of least resistance was such as to especially strain and render permeable the foot wall country. Whatever may have been the cause, we can simply deal with the result. The fact that each of these bedded deposits has been discovered by exploring the fissure and not otherwise, and that once ignore the fissure, and there is no other index to (their) existence, is strong evidence of their essential unity with the fissure."

Finally, in the discussion of this branch of the case, we may say that the great irregularities and dissimilarities in ore occurrences as found in mines upon different veins; the almost infinite variety of form and shape in which the ores will be found deposited, is such that in no two cases brought before the courts will the facts, in this respect, be found to closely resemble each other. We can only refer the court to a few leading cases in which what constitutes a lode or vein, within the meaning of the act, what is requisite and what sufficient to establish identity and continuity thereof, has been passed upon.

Stevens v. Williams, et al., 23rd Federal Cases, pages 44, 45;

Meydenbauer v. Stevens, et al., 78 Federal 787-91;

Iron-Silver Mining Co. v. Cheeseman, 160 U. S. 529-36, 534-5;

The Eureka Case, 4th Sawyer, page 302;

Penn. Con. Mining Co. v. Grass Valley Ex. Co., 117 Federal 509;

See also *2nd Lindley on Mines*, Sec. 615, pages 1112-1125.

THE CASE UPON THE ACCOUNTING.

The K-K Company first discovered ore in the Conkling claim in October or November, 1906. It had run the Alliance tunnel and numerous drifts and cross cuts therefrom in the effort to find and extract ore from the Conkling claim. In the driving of the McKay cross cut southerly it discovered the ore in controversy in this case. The great

bulk of it admittedly was taken from the 135.5 foot strip. (See opinion of Court of Appeals, p.)

In May and June, 1907, a number of actual shipments of ore from the 135.5 foot strip were made. Six hundred and fifty-nine tons of the first-class ore were shipped directly to the smelter. Seven hundred and twenty-five tons of the second-class were milled and the concentrates shipped. The actual metallic contents of the ore were proved by the smelting returns, and, of course, were matter of record in the office of the smelting company.

It was testified by Mr. James Hurley that this ore, thus shipped to the smelter, *was as good as any ore extracted from the ground in controversy while he worked in the mine*, which was from the time the ore was struck until July, 1910. During all of this time ore was being extracted from the stope. Up to that time all the ore had been taken from the 500 level. The actual extraction of ore was suspended for some time, and was not resumed until 1913, when extraction was continued until notice of the decision of the Court of Appeals reversing the judgment of the trial court was received in March, 1916, whereupon all work in the disputed ground ceased.

It is stated in the opinion of the Court of Appeals, (page 2 thereof), that when the K-K Company struck the ore it did not advise its co-tenant of the discovery.

There were two reasons why it did not do so:

First. It claimed that the 135.5 foot strip was not a part of the Conkling ground.

Second. It claimed that all the ore was contained in the Crescent fissure vein.

The merits of these two contentions we have already discussed. Both were upheld by Hon. John A. Marshall, former Judge of the District Court. His decision was rendered in August, 1912, as heretofore stated. The petitioner extracted ore from the ground in dispute in 1913, 1914, 1915 and 1916. During those years it was taking the ore, of course, by virtue of the positive decree of the lower court, awarding it title to the 135.5 foot strip by virtue of its ownership of the Custer and Silver Hill claims, and awarding it also all the ore in controversy within that strip and east of it, by virtue of its ownership of the apex of the vein in which said ore was contained.

It seems difficult to speak with moderation of the contention that petitioner, in extracting the ore from the premises in controversy, either before or after the rendition of this decree in its favor, was, to use the language of the Court of Appeals in this case, "acting as a negligent or reckless trustee or agent," and that therefore if, at the close of the hearing, any fact remained uncertain or doubtful, the doubt should have been resolved in accordance with the principle that a negligent or reckless trustee or agent shall receive no profits from his wrongful treatment of the property of his *cestui que trust*. (Court of Appeals opinion, pages 4-5.)

Because of its claim to the exclusive ownership of the ore, the King Company never kept any record of the quantity and value of the ore for the purpose of making an account thereof to the Conkling Company. The King Company, however, did about May, 1909, inaugurate a

system whereby an actual written record was kept of each car of first and second-class ore extracted. It did not, however, at any time keep any account of the mineral contents or value of the disputed ores, but mixed all the ores in controversy with ores from the "Silver King" mine, which was situated about a thousand feet northerly of the ground in dispute.

When it became necessary to account for the ore taken the King Company introduced in evidence its ore extraction record showing the actual number of cars of first and second-class ore taken from the disputed ground after May, 1909, and until the cessation of work in 1916, following the decision of the Court of Appeals reversing the trial court's decree. No record was available as to the number of cars of first and second-class ore extracted prior to May, 1909.

Evidence was introduced showing the extent of the excavations made in extracting the ores from the Conkling claim, as its boundaries were determined by the Court of Appeals, and also from adjoining ground.

The trial court, Hon. Tillman D. Johnson presiding, determined the amount of ore extracted prior to May, 1909, by taking the size of the excavations made in extracting it, determining from the evidence the proportion of first-class, second-class and waste, taking 6 cubic feet as the space occupied by a ton of first-class ore in place, and 7.62 cubic feet as the space occupied by a ton of second-class ore in place. The volume of ore removed after May, 1909, was determined by taking the shift bosses' record as to the ratio of first to second-class ore,

considering the size of the excavations in the Conkling ground from which the ore had been extracted, deducting a certain percentage for waste, and taking for the cubic feet occupied by first-class and second-class respectively, the ratios above mentioned.

The value of the ore was not determined by the trial court, but compensation was awarded the plaintiff upon the basis of the average value of all the ores shipped from the Silver King mine during the years in question, upon the principle applicable in the case of wrongful confusion of profits. As before stated, a decree was rendered in favor of the plaintiff and against your petitioner for the sum of \$542,222.58, which was increased by the Court of Appeals by the addition of \$27,853.92, making the total judgment \$570,076.50. (This increase was arrived at by setting aside the allowance made your petitioner by the chancellor for the value of certain work done by petitioner in exploring the ground in search of the ore.)

The contentions of the petitioner with respect to the accounting are as follows:

1. The evidence affirmatively required a finding by the trial court and by the Court of Appeals that first-class ore in place occupied not less than 6.5 cubic feet per ton, and second-class ore in place not more than 8.1 cubic feet per ton.

2. That since petitioner took the ore in good faith, as found by the trial court and by the Court of Appeals (Opinion, Court of Appeals, p. 12), and since the act of petitioner in mixing the ores in dispute with its own ores did not deprive the plaintiff of the ability to prove the

value of the ores in dispute,—it appearing affirmatively from the evidence that the plaintiff was able to make proof of the value of the ores—the burden was not on the defendant to prove the value of the Conkling ores.

3. That the defendant nevertheless introduced affirmative evidence by actual carload shipments of the mineral contents of the Conkling ores, and affirmative evidence of the prices at which ores of such mineral contents were sold during all the years involved in the accounting; and that the value of the ores in dispute as thus determined ought to have been accepted by the trial court and by the Court of Appeals, especially in view of the fact that the plaintiff company withheld the evidence in its possession bearing upon the values of these ores, and the petitioner took the ore in good faith.

If 6.5 had been taken as the cubic feet per ton occupied by first-class ore in place, and 8.1 as the cubic feet per ton for second-class ore, and values calculated according to the method adopted by the trial judge, the decree would have been for the sum of \$488,911.14.

If the volume of the ore extracted had been calculated by using the above ratios (6.5 and 8.1), and the value of the ore from the disputed ground determined by the value of K-K carload shipments made by petitioner's predecessor, the decree of the trial judge would have been for the sum of \$176,002.36.

If the trial judge had based the value of the ore extracted upon the value of K-K carload shipments made by petitioner's predecessor from the ore body in controversy, his judgment would have been for the sum of

\$205,691.12, calculating the volume of ore removed by the method he adopted.

We first discuss the contention that the value of the ores in dispute should have been determined by the smelter returns of the 659 tons of first class and 725 tons of second class shipped from the ore body in dispute as concentrates.

We quote the following from our brief on appeal:

Value of the Ore.

As we have shown above in our statement of facts, (and there is no dispute about it,) there were actually shipped from these stopes in the K-K shipments in 1907, 659.15 tons of crude or shipping ore, and 252.06 tons of concentrates. It was expressly stipulated upon the trial that the ratio of concentration was 2.875 tons of crude into one ton of concentrates; hence these concentrates represent about 725 tons of crude ore. It must be remembered that all the ore in these stopes was extracted *from one ore body*. The actual metallic contents of these shipments made in 1907 is proved by the smelter returns. The ore was assayed first by the mining company, then by the smelting company, and then by an umpire. It was paid for upon the basis of these assays. The metallic contents of this ore consisted of silver, lead and gold, only. There is no doubt of the assay value of the ore, and the uncontradicted testimony is that it was as good ore as was at any time extracted from the stopes while Mr. Hurley and Mr. Dailey worked in the property from the time the ore was struck until July, 1910.

Mr. Humes' and Mr. O'Neill's testimony shows that

the ore below the 500 level was of approximately the same quality as the ore from the Elephant stope. The K-K shipments consisted of ore extracted from the very "core" of the ore body. Under the circumstances of this case is it too much to insist that this enormous sample, taken from the ore in place, not a specimen, merely, a number of pounds, but more than a thousand tons, be taken as evidence of the mineral contents of all the ores afterwards mined from this same ore body?

See *Golden Reward Mining Co. v. Buxton Mining Co.*, 97 Fed. 420;

Montana Mining Co. v. St. Louis Mining & Milling Co., 183 Fed. 70.

Especially do we insist that these shipments ought to be regarded as establishing the mineral contents of all the Conkling ores, because beginning June 30, 1908, and for four years thereafter, the plaintiff's representatives were constantly in the stope and produced no evidence at the trial, not a single sample or assay taken upon any of their visits to the stopes, to prove the value or character of the ore. It is not credible that in view of the controversy existing between the parties, no samples were taken by the representatives of the Conkling Mining Company after they procured the order of June 30, 1908, which gave them the right to visit the stopes for the very purpose of determining the value and quantity of the ore removed, a right which confessedly they exercised to the fullest extent. Why were the representatives of the appellee visiting these stopes so constantly, if not to procure and preserve evidence to prove appellee's rights and its share of

the proceeds of the ore? Mining men, all of them, they thoroughly understood that fair samples of the ore would have furnished proof, not only of the value of the ore, but the means of determining the space per ton occupied by the ore in place.

The Court expressly finds in favor of the appellant that these K-K shipments came from the Elephant stope, but refused to find that they were representative of the metallic contents of ores subsequently extracted. In this we insist the Court was plainly in error. What reason is there for supposing that the ore subsequently shipped contained any more silver, lead or gold per ton than the K-K shipments? Instead of taking the mineral contents of the K-K shipments as evidence of the mineral contents of all the ores, the Court took the average amount realized by the defendant for all the ores shipped from the Silver King mine during the period when ores were being shipped from the Conkling claim. We insist that such a method of arriving at the net proceeds received by the defendant from the Conkling ores would be proper only in a case where the plaintiff company had never had any opportunity to procure and produce evidence of the value of the ore, and was unable to prove the value because of the defendant's fraud, and where it further appeared that there was no logical or substantial evidence produced by the defendant from which the value of the ores could be determined. No such case is presented. Here the plaintiff had every opportunity to possess itself of the evidence of the value of the ores coming from the Conkling ground,

certainly after January, 1908, and actually was in possession of such evidence at the time of the trial.

Then again the evidence proves beyond controversy that the appellant in taking the ore was not consciously invading any rights of appellee.

In *Golden Reward Mining Company v. Buxton* (97 Fed. 420), the value of the whole ore body which had been worked by the defendant was allowed to be proved by showing the average assay value of samples of ore taken from outside the stope immediately adjacent thereto, as it had been worked out by the defendant, when it was shown that the ore bodies from which said samples were derived were of the same general character as the ores mined out of the stope, and a continuation of the same ore body.

We concede that where a plaintiff brings suit to recover the value of property which the defendant has wrongfully intermingled with his own, *and it is proved that plaintiff has no means of proving the amount of his share*, there is authority for saying that the Court will give the whole to the plaintiff as a punishment of the wrongful conduct of the defendant, *unless the defendant is able to show what portion of the whole belongs to him*. If he is able to do this, of course he will be allowed to keep his share, *notwithstanding his fraud*. So where the defendant takes the plaintiff's property and wrongfully intermingles and sells it with his own, and plaintiff sues for the value of so much of the property as was his, *and shows affirmatively his inability to prove the value of his portion of the property*, and that his inability to make such proof is alto-

gether the fault of the defendant, it is fair to require the defendant to prove the value of the plaintiff's portion of the property which has thus been intermingled and sold; and, *in the absence of such proof*, it is fair that the value realized for the sale of the entire property thus intermingled, if such evidence is available, shall be taken, and that the plaintiff shall be awarded compensation upon the hypothesis that his property was equal in value to the average value of the whole mass; but we insist that where the intermingling is innocently done *and the defendant introduces evidence reasonably tending to show the value of the plaintiff's portion of the intermingled property, and such evidence is practically undisputed*, the value of plaintiff's property and the amount realized for it by the defendant should be based upon such evidence, and the average value of the whole ought not to be taken as the measure of the value of plaintiff's portion.

Especially is this true where it appears that the plaintiff has had opportunity to procure and preserve evidence of his rights, and having procured and preserved the evidence, *fails* to introduce it.

The average value of the whole, where there is no evidence of the value of the plaintiff's portion, *is not awarded to the plaintiff upon the hypothesis that his portion was equal in value to the rest*, but when he is compensated on this basis it is *because there is no evidence fairly tending to show the value of the plaintiff's portion*. Where there is evidence from which the value of his portion may be ascertained this evidence ought to be accepted, *just as it would be accepted if there had been no*

intermingling, for to reject it and award him damages on the basis of the average value of the whole, is then to award damages not based upon evidence, when the evidence is available and has been produced. If it is the rule that the plaintiff is entitled to damages or compensation upon the basis of the value of the property intermingled and sold, of which his own was only a part, when there is substantial evidence of the value of the plaintiff's portion, then the plaintiff in such cases ought to be required to accept compensation on the basis of the average price received for all the ore, after ascertaining the portion thereof which belonged to him, even though the average value of the intermingled mass was less than the plaintiff's part of the whole. One is naturally led to inquire whether if the evidence in this case had shown that, taking the prices realized by the defendant for all the ores shipped from its mine during the period when the Conkling ores were being shipped, its net proceeds per ton were less than the net proceeds per ton realized from ore of the metallic contents of the Conkling shipments in the various years during which the ore was sold, the plaintiff would then have been content if the defendant had insisted that the metallic contents of the K-K shipments were no evidence of the value of the rest of the ores from the stope in controversy?

Would defendant have been indulged in such a contention? Why is not the contention of the petitioner irresistible, that values ought to have been determined by reference to the metallic contents of the K-K shipments? The only reason, apparently, why values were not so de-

terminated, is that the method adopted resulted in a greater judgment for the plaintiff, and the theory seems to have been that the plaintiff was entitled to as large a judgment as possibly could be given under any view of the evidence, upon the ground—at least this is the ground upon which the Court of Appeals affirms it—that the defendant was a wrongdoer; that is to say, took the ore knowing that it was not entitled to it, and failed to keep an account of it for the conscious purpose of defrauding its co-tenant.

The Court of Appeals on page 4 of its opinion, says:

“The King Company was a trustee for the complainant of its share of the ore it took and of the proceeds thereof. As such trustee it violated its duty to notify its co-tenant of its entry and taking of the ore, its duty to keep the ore separate, its duty to keep an account of it, and of its proceeds, and its duty promptly to account for and pay to its co-tenant its just share of the proceeds of the ore. If the King Company had discharged these duties the amount that should be recovered could have been readily ascertained and clearly proved.”

It seems clear that the Court of Appeals was of the opinion that the method adopted by the trial court for the determination of the value of the ore in controversy was justifiable upon the ground that the King Company was a trustee for its adversary of all the ore extracted.

Ordinarily where there are joint owners of a mining claim if one of the co-tenants mines and sells the ore he may be deemed as acting for himself and as trustee for his associate in the title, and he ought to keep an account, because it is his duty to pay over to his co-tenant the

latter's share of the profits, but this duty arises from a knowledge of the obligation on the part of the operating co-tenant.

The Court of Appeals cites as its authority for the statement that it was the duty of petitioner here to keep an account of the ore it extracted, the Consolidated case, 204 Fed. 166, 180, 122 C. C. A. 402. The case is not at all in point. In that case the parties were co-tenants of the claim from which the ore was taken and the Silver King Company never at any time claimed any exclusive interest in or right to the ore, but at all times knew and admitted that the ore which it was taking was not its exclusive property, and that it owed an account thereof to its co-tenant. Its failure to keep an account was a violation of duty, because it knew that the account was due.

It is rather superficial reasoning to say that when one co-tenant takes ore from the joint property, it is his duty to keep an account of it, and of its proceeds, and it is his duty promptly to account for and pay to his co-tenant his share of the proceeds of the ore, and then say the King Company was a co-tenant of the Conkling Company of the ground in controversy, and therefore of the ore extracted, and therefore these duties were encumbent upon it, and hence upon the authority of the Consolidated case it was a reckless and negligent trustee. This argument wholly overlooks the substance of things. When we speak of a breach of duty involving a person in any untoward consequences, we mean that the person accused has neglected to do that which it must be presumed he knew he ought to have done, and which a good man in his

place would have done. "Duty is conduct due to parents and superiors, as shown in obedience or submission; respect; reverence, act of respect." A child having reached a certain stage of intelligence is presumed to know what conduct is due toward his parents, and if he omits it is guilty of a breach of filial duty, if he is conscious of the relationship, but who would blame him who failed of respect or affection when he had to offer as his excuse that he was ignorant of the relationship; as may well happen? To fall short of the duties of a soldier, one must know that he is a soldier. Duty is that which is required by one's station or occupation; that which a person is bound by moral obligation to do or refrain from doing. No man can be said to violate a moral obligation of the existence of which he is ignorant, certainly not when the courts of his country have held that the obligation does not exist.

In the Consolidated case it not only finally became the legal duty of the defendant to account for the ores taken, but the defendant during every moment of the taking knew of the existence of that obligation. But in the case at bar petitioner's predecessor in interest, the K-K Company, purchased the ground in controversy from the Belmont Mining Company for \$125,000, the Belmont Company claiming the ground under a patent of the United States, which admittedly conveys every foot of it—the patent to the Silver Hill and the Custer claims,—which in turn are admitted to have been located prior to the location of the Conkling claim. Relying upon this patent, petitioner refused to keep a separate account of

the ore for the benefit of the Conkling Company, and the controversy was taken before the District Court, and Judge Marshall held that the patent to the Custer and the Silver Hill conveyed the 135.5 foot strip to the Belmont Company, and the Belmont Company had conveyed it to your petitioner, and that all the ore in controversy was in the Crescent fissure as claimed by petitioner; that petitioner was wholly within its rights in taking the ore, and had good right and title thereto, and a decree was entered accordingly, and thereafter petitioner again extracted ore from the premises in controversy. At first the ore was taken by virtue of a patent of the United States and at last by virtue of a decree of a court of the United States, and it seems to us that it is a bitter thing—indeed a mockery—to say to a litigant who relied upon the propriety and correctness of the action of the executive branch of his Government, and upon the propriety and correctness of the action of its judiciary, that in so doing he was all the time acting recklessly, negligently and in violation of his duty,—without advancing a single reason why he was not justified in relying upon the patent, or why he was not justified in relying upon the decree, citing merely as proof of his delinquency a case in which the party condemned had neither patent nor decree for his excuse. The Court of Appeals was not, however, entirely consistent in its harsh judgment of petitioner's conduct.

After having used the foregoing quoted language, in order to support the findings of the trial Judge, Hon. Tillman D. Johnson, the Court takes up for consideration

the cross appeal of the Conkling Mining Company, and when it comes to deal with the contention of that company that the judgment against petitioner was insufficient, and that it should have been based, not upon the yearly average price per ton obtained for the mixed ore, but upon the highest price per ton received by the King Company during each yearly period from any of the ore taken from the mine during such period, says:

"If all the ore in controversy had been taken from that part of Conkling ground easterly of the 135-foot strip without the knowledge of the Conkling Company and without opportunity for it to examine the ore and measure the work or the cavity during the process of the extraction, it might have been just and necessary to charge the King Company the highest price it received from any of the mixed ore in each year. But the great bulk of the ore came from the 135-foot strip. The King Company claimed the exclusive ownership of that strip and its officers testified that they believed that the claim was well founded. In view of the facts that the District Court [Judge Marshall] sustained that claim,—that the *nature of the controversy* was such that the King Company and its officers cannot be held to have been without probable cause to believe that its claim might be sound *until it was otherwise adjudged by this court*, and that from July, 1908, under the order of the court below the Conkling Company had the privilege and opportunity of examining the ore as it was removed, and of surveying the cavities from which it was taken, this court is of the opinion that the use of the average yearly prices of the mixed ore sold as the basis of the estimated value of that taken from the Conkling claim, is more likely to produce a just and equitable finding of its value than the use of the highest price of any of the mixed ore sold during each year. It is, therefore, unwilling to change the basis

of the estimate of the value of the ore which the court below adopted."

Here it seems to us that the Court of Appeals very justly takes the petitioner entirely out of the class of reckless and negligent trustees who fraudulently failed to keep an account for the benefit of their *cestui que trust*, to which class it seems to us it has certainly consigned us in the previous portion of its opinion.

It is not only true that "from July, 1908, the Conkling Company had the privilege and opportunity of examining the ore as it was removed, and of surveying the cavities from which it was taken," but it actually exercised such privilege and availed itself of such opportunities *for a period of four years while the ore was being removed*. We do not clearly perceive the logic of the argument of the Court of Appeals. There is no doubt of the fact that the method adopted by the trial court for the determination of the value of the ore extracted from the ground in controversy produced a more equitable finding than if it had adopted the method insisted upon by the Conkling Mining Company in its cross appeal. But it does not seem to us that this conclusion rests upon the fact that the King Company took the ore in good faith, and that the Conkling Company under the orders of the Court had the privilege and opportunity of examining the ore as it was removed. The significance of the fact that the District Court found that the King Company acted in perfect good faith in taking the ore, and of the fact that the Conkling Company witnessed the taking of it and had

opportunity to determine its value, and admittedly did determine its value as it was taken, seems to us to have been entirely overlooked, both by the Chancellor and by the Court of Appeals. These facts forbade equally the estimation of the value of the Conkling ores by the method adopted by the Chancellor, and by the method proposed by the Conkling Company on its cross appeal. *These facts required the Chancellor to look to the evidence bearing upon the question as to the actual value of the ores taken from the ground in controversy, and to base the judgment upon such evidence.*

A distinction is made in the authorities between cases of confusion of property by agents, bailees, executors, administrators, and other trustees and persons not occupying such relations.

See *Clafin v. Continental Jersey Works, et al.*, 11 S. E. 721. (Georgia.)

In the case above cited the Court states the rule as follows:

"Where one fraudulently, wilfully or wrongfully intermingles his goods with those of another *so that there is no evidence to distinguish the goods of the one from the other*, he is guilty of a confusion of goods and forfeits all his interest in the mixture to the other party."

In the case at bar, of course, the intermingling of the Conkling ores with the ores from the Silver King mine is not claimed to justify the forfeiture of all the ores to the Conkling Company, because the quantity of ore was approximately determinable. The effect of the inter-

mingling and selling the ore all together was to confuse the proceeds received for the Conkling ore with the proceeds received for ore from the Silver King mine. If one miner intermingles his ores with ores belonging to another, and sells them for a gross price, and the other party knows and can prove the quantity of ore which was taken from him and the value of it, no inconvenience from the mingling of the property arises. If he is unable to make such proof, *and proves such inability*, the Court will cast upon the defendant the burden of proving the quantity and value of the plaintiff's share of the ore; and if the defendant was an agent, bailee, executor, administrator or other trustee, occupying a position of trust or confidence, or intermingled the property from improper motives, he will be required to make such clear proof of the quantity and value of the plaintiff's portion that it is reasonably certain that a judgment in accordance with such evidence will give the plaintiff all he is justly entitled to receive, and if the defendant's evidence falls short of this degree of certainty, the plaintiff's compensation will not be based upon it, but he will be awarded a sum which, under any reasonable view of the facts, makes it certain that he has not lost anything *by the defendant's wrongful conduct*.

But the rule above stated is applicable only to the situation stated, namely, where the party who intermixes the goods does so fraudulently or contrary to his known duty, as an agent, bailee, executor, administrator or other trustee, all of whom occupy a position of trust or confidence. The reason of the rule arises from the fact that

the confusion of the property or of the price received for the property is the result of a wrongful act upon the part of the defendant, the word "wrongful" as used here implying an improper motive or purpose.

Hentz v. The Idaho, 93 U. S. 575.

See *Claflin v. Continental Jersey Works, et al.*, *supra*.

Where one person takes and sells property which belongs to another, but believing it to be his own, the owner upon suing for the value of it is certainly charged with the burden of proving its value. What happens if he fails to prove its value? Inevitably no relief will be afforded him. It is elementary that merely because the plaintiff is unable to prove the value of his property, in such a case as we have last supposed, the burden will not be cast upon defendant to show the value of it. The burden will not be cast upon the defendant to show the value of the property, unless it is his fault that the plaintiff is unable to make such proof, the general rule of law, as stated by this Honorable Court, being that the plaintiff must prove its case and carry the burden imposed by law upon every person seeking to recover money or property from another.

Garretson v. Clark, 111 U. S. 120;

Westinghouse v. Wagner, 225 U. S. 604.

If in a given case it is the defendant's fault that the plaintiff is unable to make the requisite proof, it is evident that the defendant's fault may be of two kinds: It may be wholly excusable, resulting from accident or mis-

take, and the defendant may have acted in entire good faith, or the defendant may have acted contrary to his known duty, and wilfully and wrongfully and with improper motives.

Now, we conceive that the same rule is not applicable to both of these situations. Where the intermingling is innocent and the defendant attempts to prove the value and quantity of the plaintiff's share, the question ought to be determined upon the evidence adduced. The evidence of the defendant ought not to be capriciously rejected. It ought to be weighed just as fairly as it would be weighed in a case where there had been no intermingling. There is absolutely no reason for discrediting a party's evidence of the value of his opponent's property merely because he has intermingled it with his own.

Armory v. Delamirie, 1 Stra. 505;

Lupton v. White, 15 Chan. Rep. 440.

Speaking of such cases the English court says in effect that such decisions are not made upon the notion that strict justice is done thereby, but that it is the only justice that can be done under the circumstances. The method of awarding damages adopted in the diamond ring case is not based at all upon the theory that the plaintiff's damages are thereby accurately ascertained. The Court proceeds in such cases upon the hypothesis that it is *impossible to determine the plaintiff's damages*, and this impossibility having arisen from the wrongful conduct of the defendant, a sum is awarded the plaintiff by way of damages which makes it certain that the plaintiff suffers

no loss by the defendant's wrong doing. But all this proceeds upon the hypothesis of the inability of the tribunal to ascertain from the evidence approximately what is the plaintiff's due.

See *Ryder v. Hathaway*, 21 Pick. (Mass.) 298.

In *Thomas Smith v. Rastus W. Sanborn*, 6 Gray's Report 134, it is said that:

"The burden is upon a claimant seeking to enrich himself at the expense of his neighbor *to show that justice cannot be done him unless his neighbor shall be despoiled.*"

So we say that in the case at bar the burden was upon respondent to show that justice could not be done it, except in the manner adopted by the court, for the court did not thereby ascertain, or pretend to ascertain, the plaintiff's share—the court in effect decided that the value of the ore could not be determined from the evidence. Herein lies the fundamental error of the learned Chancellor and of the learned Court of Appeals.

What reasonable doubt is there that the 1384 tons of ore shipped from the ore body in dispute was fairly representative of the metallic contents of all the ore taken by the defendant from the so-called joint property?

Mr. Andrew L. Hurley was called as a witness for petitioner. He was then superintendent of the Cardiff mine, and a wholly disinterested witness. He said:

"The ore that was mined in running the drift through the core of the ore body westerly from the bottom of the K-K raise, the first ore that was mined there, was not taken directly out of the mine. It was

stored in the Crescent cross cut. . . . There was considerable of the ore stored there before it was shipped. . . . I would say a thousand cars of first-class. . . . I believe the first shipment that was sent to the smelter was all crude ore, but I have not examined the returns of the shipment to see whether any of it was concentrates or not. . . . The first shipment was made very shortly, just about the time of the consolidation, whatever time that was." (Tr. case 5188, pages 184-185.)

On page 192 of said record, paragraph 5, Mike Dailey refers to this ore mentioned by Mr. Hurley, and states that a record of the shipments is contained in the company's office showing how many tons of first-class and how many tons of concentrates went out in said shipments, and the value of the smelting returns. These are the K-K shipments to which we have referred and the value of them is shown by Exhibit 70. (Record, p. 525.)

Again, referring to the testimony of Mr. Hurley,—he said, in referring to this ore:

"I do not believe we got any better grade of first-class ore anywhere in the stope than what we had in that drift driven in the core of first class." (See Tran. of Rec., case 5188, p. 180, paragraph 5.)

Mr. Hurley was shift boss at the mine, and it was his duty to observe the character of the ore daily. He worked continuously in the stopes in question from the time the ore was struck in November, 1906, until July, 1910.

Mr. Frank Dailey was foreman of the mine while Mr. Hurley was shift boss. He was in Idaho at the time of the trial, and counsel for respondent stipulated that if he

were present he would testify as Mr. Hurley had. (Printed record, page 20.)

The K-K shipments came from the 500 level. The ore body extended to the 600 and the 700, finally dipping out of the Conkling ground through its westerly end line and southerly side line.

James Hume, a witness for petitioner, testified that the quality of the ore in the 600 stopes was just about the same as the ore on the 500 level.

(See Trans. of Record, pages 304-305.)

Mr. Cornelius J. O'Neil testified that the ore in the stopes from the 700 was about the same grade as that from the 600 stopes.

(Tr. of Rec., p. 262, paragraph 4.)

In addition to this testimony it may be suggested in passing that if there had been any significant variation in the value of the ore extracted from time to time, respondent certainly would have known of the fact and been able to prove it, for it was familiar with the ore being extracted from the stope during a period of four years.

We also call attention to the fact that during the period from June 1st to December 31, 1916, petitioner shipped from this same ore body 298 tons of crude or first-class ore, and it realized \$38.80 per ton. The exact metallic contents of these nearly 300 tons of ore were as follows:

Gold025 oz. per ton
Silver	17.81 oz. per ton
Lead	28.6 per cent

(See Exhibit 96, case No. 5188, p. 538.)

This same exhibit shows that the concentrates made from the second-class ore from this same ore body averaged during said six months' period (June to December, 1916), \$32.25 per ton.

(The average lead content per ton of the first-class, K-K shipments was 34.72 per cent lead.)

In examining Exhibit 96 it must be borne in mind *that all the ore on the Alliance side* was extracted from the ore body, a part of which is in controversy in this case. The Kearns-Keith property, which includes the Conkling claim, was once known as the Alliance mine. After the Consolidated Company was formed (the petitioner in this case), the Kearns-Keith property was often referred to as the Alliance side. All the ore on the Alliance side came from the Crescent fissure vein and from the ore body a part of which is in dispute, either within or without the Conkling claim.

Exhibit 96 tends to show affirmatively the injustice of basing the plaintiff's compensation upon the average value of all the ore shipped. This exhibit shows that the average crude ore shipped from the Silver King mine from June to December, 1916, was worth per ton \$52.17, and the average concentrates \$36.84, while from the Alliance side, that is to say, from the ore body from which all the ore in controversy was extracted, the average shipping ore was worth \$38.80, and the average concentrates \$32.25 per ton.

It must be remembered that the foregoing testimony in regard to the value and quantity of the K-K shipments, and of the additional shipments of nearly 300 tons of ore

from the ore body in dispute is not contradicted by any evidence in the case, and the defendant's ore book (Exhibit 53), which was proved to agree with the books of the American Smelting & Refining Company, furnished the data whereby, assuming all the ore from the disputed ore body to have contained the same metallic contents of the K-K shipments; the exact prices realized by petitioner for all the ore shipped from the disputed ore body from 1907 to 1916, was a mere matter of arithmetical calculation.

Our contention is that it was the duty of the Chancellor to determine the value of the ore upon this uncontradicted evidence produced by petitioner, and that this is especially true in view of the fact, which appears without dispute, that the respondent at the trial had the means of proving the value of the ores extracted by the defendant, and with such evidence at its disposal permitted the defendant's evidence upon this question to stand upon the record wholly uncontradicted. The only rational inference to be deduced from this conduct of the respondent, is that it was satisfied that a judgment awarding it compensation upon the basis of the metallic contents of the K-K shipments would do it no injury. The true doctrine was expressed by Judge Phillips in a Colorado case, where the defendant took ore from the plaintiff's mining claim under claim of extralateral rights, the plaintiff the while contesting the defendant's right to take the ore. In charging the jury in the Circuit Court of the United States Judge Phillips said:

"It has been insisted by counsel for plaintiffs that

after defendants had knowledge that plaintiffs contested their right to mine within the side lines of plaintiff's claim, they should have kept the ore there extracted segregated from other ores, so that its exact measurement and valuation could have been more nearly ascertained, and that their failure to do so should be construed most strongly against them. Of course, gentlemen, if you should believe, from the evidence, that this was so,—that defendants thereafter mingled the ore taken from within plaintiff's side lines with other ore, with the purpose of preventing or obstructing the ascertainment of its quantity and value, or in wilful disregard of plaintiff's rights,—you would be warranted in construing such conduct against the defendants. *If, on the other hand, you should believe that defendants, in the honest belief that they were of right pursuing their vein of ore, and without any design to cover up the quantity or value of ore taken, and in the usual mode of handling and marketing such ore, they suffered it to mingle with other ore, or failed to keep it segregated, and that they have presented here the best evidence obtainable by them, of the result of the ore so excavated and shipped, then you should ascertain the approximate value of the ore as best you can, from all the facts before you bearing upon this issue.*"

The learned Chancellor before whom the case was tried, speaking with reference to the value of the ore, said:

"The evidence shows that the K-K shipments were taken from the Elephant stope, but from a consideration of all the testimony in the case, as well as the lack of testimony upon certain essential matters, I am not satisfied that these shipments represent the value of all the ores taken from the Conkling ground. There is a remarkable dearth of testimony respecting the assay value of the ores taken during the period of nine years while the mine was operating."
 • • • • (Record, p. 467.)

With all deference to the learned Chancellor we think the innuendo is directed against the wrong party. The K-K Company before it was consolidated and merged with petitioner company made only the few shipments which have been referred to as the K-K shipments. After these shipments were made, all the ore from the ground in controversy was mixed with the Silver King ores. The mine cars of ore, both crude and second class, were sent up the shaft and assays were made, of course, of the crude ores which went to the smelter, and of the second class which went into the mill. But this was after the mixing of the ore with ore from the Silver King side. No separate assays of the ore from the ground in controversy were ever made by the defendant. This is admitted by our opponent upon its cross appeal. Complaint of the failure to keep a record of assays of ores from the Conkling ground is expressly made by respondent, and the claim is made that if such a record had been kept it would have been possible to construct a more satisfactory account. (See brief of appellant, Conkling Mining Company, Case No. 5190, p. 21.)

There was no occasion for making such separate assays. The only testimony in regard to assaying ore from the ground in controversy was given by Mr. Hurley, who said:

"As a general rule with rare exceptions you could tell reasonably close by looking at the ore we were mining whether it was shipping or mill ore. There were not many assays made or necessary in order to determine this classification; not very many; it wasn't necessary." (Printed record, p. 185.)

There was a significance in the failure to produce samples and assays taken while the stope was being worked, but the significance arises from the following testimony, namely: That respondent on June 2, 1908, applied for an order to inspect the ore being removed from the stope; (printed record, p. 5, Case 5188,) on June 30, 1908, the Court made an order giving respondent the right to measure and determine the amount and value of the ore (same record, p. 6); in July, 1909, respondent filed an amended bill in which it is distinctly averred in paragraph 15, that pursuant to said last named order it visited and ascertained the value of the ore being extracted from the ground in controversy. (Printed record, p. 19.)

At the trial the respondent failed to produce and examine as a witness, with respect to the value of the ore, Mr. Leonard Burch or Mr. Will Treweek or Mr. Gillette, all of whom were employed by respondent in the business of visiting petitioner's mine for the purpose of procuring evidence to enable respondent to prove the value of the ore.

(See Tr. of Rec., pp. 377, 378, 379, Case 5188.)

It is a mere matter of calculation and it will not be denied that if compensation had been awarded the plaintiff upon the basis of the metallic contents of the K-K shipments, the judgment of the Chancellor would have been in favor of the respondent for the sum of ~~\$289,692~~^{\$289,692}, whereas upon the basis of the average value of all the ore shipped by the defendant, both from the property in controversy and its Silver King mine, plaintiff was awarded \$542,222.58.

If we take the shipments for the seven months preceding the shipment of any ore from the Elephant stope as shown by Exhibits 86 and 90, and compare these with the shipments from the entire mine from May 1, 1907, to the end of that year as shown by Scholefield's tabulation, Exhibit 68, taken from the ore sales book, we will find that the ore from the premises in controversy could not have been as good a grade as that taken from other portions of defendant's mine. For instance, it appears from Exhibit 68, that the average price per ton shipped during the month of May, 1907, was \$33.37; for the month of June, \$38.65; for the month of July, \$46.63; for the month of August, \$44.17; for the month of September, \$43.66; for the month of October, \$36.82; for the month of November, \$29.27; for the month of December, \$25.61; and, according to said exhibit, the average for these eight months was \$38.51.

Now, referring to Exhibit 86, we find that the average price per ton of the ores shipped in October, 1906, was \$46.59; in November, \$46.75; in December, \$46.99; or an average for these three months of \$46.77.

And referring to Exhibit 90, it appears that the average price per ton for the ores shipped in January, 1907, was \$44.32; in February, \$48.35; in March, \$44.57; in April, \$51.86; or an average for these four months of \$47.02.

Now, it will be remembered that it was during the year 1907, and after April or May of that year, that, according to the undisputed testimony, the core of the Ele-

phant stope was worked by defendant, from which the best grade of ore was taken.

Referring to Exhibit 87, which gives the monthly average price of all ores shipped from defendant's mine in the year 1912, during which year no ore was mined from the premises in controversy, we find that the price ranged from \$36.57 to \$60.79, and that the average for the year was \$45.12.

Disregarding all evidence of the metallic contents, and therefore of the value of the Conkling ores, the Court held that the defendant should be charged in the account for Conkling ores:

For the year 1907, (exclusive of the K- K shipments).

First class	\$38.72 per ton
Concentrates	44.81 per ton

For the year 1908.

First class	46.42 per ton
Concentrates	37.93 per ton

For the year 1909.

First class	40.79 per ton
Concentrates	37.39 per ton

For the year 1910.

First class	33.76 per ton
Concentrates	34.72 per ton

For the year 1913.

First class	39.61 per ton
Concentrates	26.67 per ton

For the year 1914.

First class	35.42 per ton
Concentrates	22.28 per ton

For the year 1915.

First class	36.77	per ton
Concentrates	30.25	per ton

For the year 1916.

Concentrates	39.48	per ton
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The metallic contents of the shipments described as K-K shipments were as follows:

First class:

Lead	696.73	pounds per ton shipped
Silver	20.94	ounces per ton shipped
Gold05	ounces per ton shipped

Concentrates:

Lead	830.13	pounds per ton shipped
Silver	22.53	ounces per ton shipped
Gold04	ounces per ton shipped

The average prices actually received by the Silver King Coalition Mines Co. for the contents of the ore shipped from the whole mine during the years to which the Conkling case refers were as follows:

Lead contained in first-class ore shipped:

1907...	\$4.40	per 100 pounds less 10%
1908...	3.80	per 100 pounds less 10%
1909...	4.35	per 100 pounds less 19%
1910...	4.34	per 100 pounds less 19%
1913...	4.29	per 100 pounds less 19%
1914...	3.87	per 100 pounds less 19%
1915...	4.71	per 100 pounds less 19%
(3 mos. to Mar. 31) 1916...	6.34	per 100 pounds less 19%

Lead contained in concentrates shipped:

1907...	\$4.44	per 100 pounds less 10%
1908...	3.81	per 100 pounds less 10%
1909...	4.34	per 100 pounds less 19%
1910...	4.35	per 100 pounds less 19%
1913...	4.27	per 100 pounds less 19%
1914...	3.86	per 100 pounds less 19%
1915...	4.62	per 100 pounds less 19%
(3 mos. to Mar. 31) 1916...	6.35	per 100 pounds less 19%

Silver contained in first class shipments:

1907.....	.6372	per ounce less 5%
1909.....	.5145	per ounce less 5%
1908.....	.5269	per ounce less 5%
1910.....	.5355	per ounce less 5%
1913.....	.5889	per ounce less 5%
1914.....	.5455	per ounce less 5%
1915.....	.5000	per ounce less 5%
(3 mos. to Mar. 31) 1916.....	57.61	per ounce less 5%

Silver contained in concentrates shipped:

1907.....	.6388	per ounce less 5%
1908.....	.5281	per ounce less 5%
1909.....	.5152	per ounce less 5%
1910.....	.5359	per ounce less 5%
1913.....	.5881	per ounce less 5%
1914.....	.5455	per ounce less 5%
1915.....	.4987	per ounce less 5%
1916.....	.5732	per ounce less 5%

Gold contained in shipments of first-class ore or concentrates throughout the whole period, \$19.00 per ounce.

For ore of the same metallic contents as the K-K lots at the average prices received for metals the Silver King Coalition Mines Co. would have obtained the following prices per ton of ore or concentrates shipped:

First class ore shipped:	Gross per ton	Less Freight & treatmt. charges	Net per ton
1907	\$41.22	\$15.00	\$26.22
1908	35.26	15.00	20.26
1909	35.73	14.00	21.73
1910.	36.10	14.00	22.10
1913	36.87	14.00	22.87
1914	33.66	13.00	20.66
1915	37.48	13.00	24.48
1916	48.19	13.00	35.19
Concentrates shipped:			
1907	\$47.80	\$15.00	\$32.80
1908	40.68	15.00	25.68
1909	41.12	14.00	27.12
1910	41.63	14.00	27.63
1913	42.43	14.00	28.43
1914	38.53	13.00	25.53
1915	43.99	13.00	30.99
1916	55.88	13.00	42.88

(See appellant's ore sales book, Exhibit 53.)

VALUE OF THE ORE (Continued).

1. It seems to petitioner that the rule announced by the Supreme Court of the United States in *Westinghouse v. Wagner*, 225 U. S. 604, is to the effect that where the defendant has mixed with his own the property of the plaintiff, and sold the whole, and the plaintiff sues for his share of the profits, the law does not cast upon the defendant the burden of proving the value of the plaintiff's share until the plaintiff has by evidence affirmatively proved that because of the mixture and confusion of goods with those of the defendant he is unable to prove the value of his share.

Upon this question of the ability of the Conkling Com-

pany to prove the value of the Conkling ore we beg to call attention again to the following evidence:

On July 5, 1909, the Conkling Mining Company filed an amended bill in this suit in which it is averred in effect that the value of the ore bodies in the Elephant stope had been ascertained by Treweek and Burch, the original complainants. We quote from this amended bill:

"XV. Your orator further alleges that under and pursuant to an order of this Honorable Court, made herein on the thirtieth day of June, 1908, permitting the then complainants herein, Nicholas Treweek and J. Leonard Burch, with their experts, agents and surveyors, the free and unmolested right to enter upon the aforesaid underground workings for the purpose, among other things, of measuring and determining the amount and value of the ore that had been mined by the said defendant company underneath the surface of said Conkling and Arthur lode mining claims, the said Treweek and Burch were able for the first time to, and did, ascertain the actual facts in respect to said secret underground workings as aforesaid, underneath the surface boundaries of said Conkling lode mining claim as described in said patent and herein, within planes extended downward vertically, and of the location of the ore body within said Conkling lode mining claim, and the character and extent of the ore body developed therein, and of the importance and great value of said Conkling lode mining claim, which is only valuable for the ores therein contained."

Mr. Samuel Percival Parker, a nephew of Col. Treweek, president of appellee company, was called and examined by appellee. He testified that he visited the ground in controversy the latter part of July or first of August, 1908, with Will Treweek, a son of Col. Treweek. (Tr., p. 378.)

Mr. Parker also testified: "After this visit in July or August, 1908, I made periodical visits to that part of the mine for practically four years, up until July, 1912. Sometimes I might go twice a week; sometimes I would not go for three weeks, and so on. I saw the work that was being carried on in the Incline stope. I was down that stope. I was in this Incline stope about the end of 1909, or the beginning of 1910. * * * *I believe I have some data on this from which I could refresh my recollection, but I haven't it with me!* On these various trips I made into the Elephant stope during those four years I should say Col. Treweek was with me at least a third of the trips. Whenever he was there he made notes of everything, and packed a transit and a compass and a tape, and I reported to Col. Treweek the results of all my trips. *I have seen these notes that Col. Treweek made.* Col. Treweek packed a transit in there, and made surveys before Mr. Anderson made any surveys, and after that time, too, I think. * * *

"Q. Was there ever any time when you were forbidden access or stopped from going anywhere in the stope?

A. No, sir; never." (Tr., p. 379.)

Samuel Treweek, a son of Col. Treweek, testified:

"Q. After 1908, in July, when were you next there? (Referring to the stopes in question.)

A. Off and on, Mr. Critchlow. I would go in the mine whenever father wanted me to go; sometimes he couldn't get Mr. Gillette, and I would go over with him. He never cared to go into the mine alone. He always went with someone. It was a very short distance from where I was

working. I can not tell you how many trips I made to the mine in 1908. I visited the ground also in 1909, and 1910, but not a great many times in 1910. * * * (Tr., p. 377.)

In July, 1908, as I have said, there was but little if any caving in the ground, and after that visit we were always at liberty to go in the ground in controversy whenever we desired to do so, or to send our engineers or anybody else. * * * At the time my father and I went in there in July, 1908, *father kept notes of what he observed there, and everything that he did. Those notes are still in existence.*"

Neither Will Treweek, Mr. Gillette nor Mr. Burch was called as a witness, and no excuse was given for the failure to call them.

The record shows conclusively that the Conkling Company failed at the trial to produce any of the evidence which it had gathered during the four years referred to, for the purpose of proving the value of the Conkling ores.

It is not to be doubted that after the Conkling Mining Company procured the order of June 30, 1908, which expressly granted it the right "to measure and determine the amount and value of the ore that may have been mined by the defendant company from and underneath the surface of said Conkling and Arthur lode mining claims, and for that purpose to enter with their experts, agents and surveyors the Alliance tunnels, and all drifts, winzes, upraises or stopes from all parts thereof after it passes into said claims, and into the ground adjoining and be-

longing to the defendant company, and to the face thereof," it did not procure its agents and servants to visit the stopes merely to *look* at the work. It had brought a suit for an accounting for the ore that had been extracted, and it was demanding an accounting for the ore that was being extracted, and knew that no account was being kept. Under such circumstances, unless the record affirmatively proves the contrary, we must suppose that, acting according to the ordinary dictates of human nature, the Conkling Company procured abundant samples of the first and second class ore, and had such samples properly assayed and preserved such assays. Mines are actually purchased after careful sampling of the ore in sight. Such sampling, of course, does not consist of the taking of a specimen, but consists of scores and hundreds and sometimes thousands of samples across and up and down the face of the exposed ore measures. The evidence afforded by such samples is very satisfactory proof of the value of the ore in sight. The manner of sampling is common knowledge in the mining states. The Conkling Company knew how to have the ore sampled in order to prove its value. How diligent it was in regard to visiting the stopes, the testimony discloses.

Having ascertained and being still presumably in possession of the actual facts in respect to the character and extent of the ore body and the value of the Conkling ores, which information, of course, must have been based upon assays made of numerous average samples taken from the ore body after the order of June 30, 1908, during continual visits to the stope for a period of four years, the

Conkling Company nevertheless proceeded to the hearing of this accounting and failed to produce or to give any explanation of its failure to produce any of the evidence admittedly in its possession with respect to the value of the Conkling ores.

It must be remembered that we are dealing with a single ore body. The samples taken by the Conkling Mining Company were taken for the purpose of proving the value of the Conkling ore. They were taken, too, by one having an interest to make out the value of the ore to be as high as possible.

We submit that under such circumstances where the defendant has taken the ore in good faith (and the Court of Appeals finds that the King Company did take the ore in good faith and had justifiable grounds for its opinion that the Conkling ores were its exclusive property), there is no reason why the evidence of the defendant in respect to the value of the Conkling ores should be dealt with as coming from a suspicious source, or why it should be discarded with the thought that if accepted the plaintiff might not receive its full share of the profits.

It is true that where a court has decided a fact upon conflicting evidence, its findings will not ordinarily be disturbed, but this rule we conceive has no application where the finding is the result of an obvious failure to properly weigh the evidence and give effect to those just inferences which arise from undisputed facts. No effort whatever was made by the Conkling Company to show the value of the ore extracted. With the greatest deference to the Court of Appeals, we believe that petitioner has not been

allowed the full advantage of the inferences and conclusions which ought to be deduced from this withholding of the evidence of the values of the ores, by its opponent.

Nelson, J., in *Clifton v. U. S.*, 4 How. 247: "One of the general rules of evidence, of universal application, is that the best evidence of disputed facts must be produced of which the nature of the case will admit. This rule, speaking technically, applies only to the distinction between primary and secondary evidence; but the reason assigned for the application of the rule in a technical sense is equally applicable, and is frequently applied, to the distinction between the higher and inferior degrees of proof, speaking in a more general and enlarged sense of the terms.

* * * Even in cases where the higher and inferior testimony cannot be resolved into primary and secondary evidence, technically, so as to compel the production of the higher, * * * the same presumption exists in full force and effect against the party withholding the better evidence, especially when it appears, or has been shown, to be in his possession or power, and must and should in all cases exercise no inconsiderable influence in assigning to the inferior proof the degree of credit to which it is rightfully entitled."

See also *Graves v. United States*, 150 U. S. 118;

1 Wigmore on Evidence, Section 235, *et seq.*

To recapitulate the argument in respect to the determination of the value of the ore extracted, we beg leave to submit:

1. Petitioner was a purchaser in good faith of the Custer No. 2 and the Silver Hill No. 4 mining claims.

2. These claims had been located prior to the date of the location of the Conkling claim.

3. The Custer No. 2 and Silver Hill No. 4 locations admittedly included the ground in dispute.

4. The patent to these claims admittedly conveys the ground in dispute.

5. The apex of the Crescent fissure vein in which all the ore in dispute was contained, according to the opinion of Judge Marshall, is found in the defendant's claims.

6. There is not a syllable of testimony in the case that the Conkling claim as staked originally or for patent ever included any portion of the 135.5 foot strip.

7. The ore having been taken by virtue of a claim asserted under a patent, and by virtue of a positive decree of the District Court, the good faith of petitioner was not open to question, and decisions relating to taking of ore by a trustee are wholly inapplicable.

8. All the ore was taken from a single ore body.

9. It is undisputed evidence in the case that after June 30, 1908, respondent made continuous visits to the stope for the purpose of ascertaining the value of the ore being extracted, and it is not denied that it took samples and made assays of the ore.

10. Respondent not only failed to prove that it was unable to furnish evidence of the value of the ores in controversy, but the evidence is left in such state that it must of necessity be presumed that it voluntarily withheld such testimony as it had upon that subject.

11. Where one litigant voluntarily withholds evidence in its possession with respect to the value of a thing it ought to be bound by the evidence produced by its adver-

sary, if that evidence by any reasonable construction has any probative value at all.

12. That the defendant produced evidence of more than 1384 tons of ore from the ground in controversy (K-K shipments), plus approximately 300 tons from the same ore body shipped in 1916, and that the evidence shows that all ore shipped from the ground in controversy except the K-K shipments, was mixed with ore from the Silver King mine before it was assayed, so that it was not in the defendant's power to produce any other evidence of value of Conkling ore.

13. That the evidence produced by the defendant was very cogent proof under the circumstances of the value of the ore body in dispute, and that the Chancellor was not justified in rejecting the same.

14. That awarding compensation to the respondent upon the basis of the average value of the ores shipped from the Silver King mine was wholly arbitrary.

15. That it is certain that if it had been to the interest of the plaintiff to demand compensation upon the basis of the metallic contents of the K-K shipments, such demand would have been made, and it could not be denied that these shipments afforded very cogent evidence of the value of the entire ore body.

Golden Reward M. Co. v. Buxton M. Co., 97
Fed. 420;

Montana M. Co. v. St. Louis M. & M. Co.,
183 Fed. 179.

16. The Chancellor did not refuse to accept the metallic contents of the K-K shipments as the basis for the

valuation of the entire ore body, on the ground that the metallic contents of these shipments were not sufficiently proved, for they were proved by the actual smelting returns which were introduced in evidence, and a record of which was found in the K-K ore book, and a record of which was in possession of the American Smelting & Refining Company and easily available to respondent at the trial, but the Chancellor rejected the K-K shipments as evidence of value, because of certain other evidence not mentioned or specified, and to which our attention never has been called, and because of the dearth of assays of the ore from the ground in controversy, whereas the only evidence of the ability to present assays was the evidence of the ability of the respondent to present them, the evidence affirmatively showing without conflict that very few assays were ever made by petitioner, and it being expressly admitted by respondent in its brief in the Court of Appeals that petitioner was not in a position to furnish assays.

17. The case of *Westinghouse v. Wagner*, *supra*, is clear to the point that it was incumbent upon the plaintiff to prove affirmatively its inability to make proof of the value of the ore extracted from the ground in controversy before it had any right whatever to call upon the defendant for such proof, and it is clear beyond all controversy not only that plaintiff failed to discharge such burden, but that it actually withheld evidence in its possession in respect to the value of the ore in dispute.

18. That both the Chancellor and the Court of Appeals state the rule to be that one who mixes his property with

the property of another has the burden of showing the value of the latter's share, without noticing the qualifications laid down in *Westinghouse v. Wagner*, *supra*, that this obligation does not arise until the plaintiff proves his inability to make such proof, and that such inability has arisen because of the defendant's wrong. The case at bar is squarely in conflict with the decision of this Honorable Court in the case last mentioned.

19. Basing his decision upon the only evidence in the case in respect to the value of the ore, the decree of the Chancellor must have been for an amount not exceeding \$206,691.12, whereas, by ignoring the evidence and awarding compensation to respondent upon the basis of the average value of the ores shipped from the Silver King mine, the decree amounts to \$542,222.58, whereby the plaintiff has suffered injury to the extent of \$336,531.46.

**THE VOLUME OF ORE REMOVED FROM THE GROUND IN
CONTROVERSY.**

In the ground in controversy various small stopes had been made in the extraction of ore, and the evidence of Mr. Charles P. Brooks, the petitioner's mining surveyor, gave very accurately the dimensions of these stopes, so that their cubic contents were very readily determinable. Upon the trial plaintiff introduced no evidence of the space occupied by a ton of first or second-class ore in place in the mine. Certain experiments were made with both first class and milling ore, and petitioner contended that first-class ore occupied 7.275 cubic feet per ton in place.

On and above the 600 level were three stopes, known respectively as the "600," 600 "Middle" and "600 Top stope."

Mr. Taylor, a mining engineer, called as a witness by respondent, by reference to certain evidence already in the record at the time he took the stand, endeavored to calculate the volume of ore which must have been removed from these three stopes, the total cubic contents of which had been given by petitioner's mining engineer, Mr. Brooks, as equal to 183,523 cubic feet.

From certain other evidence in the case it was estimated that one-seventh of the material which had been extracted from these stopes must have been waste. From all the data available Mr. Taylor determined to his satisfaction the number of tons of first-class and the number of tons of second-class removed from these stopes, and by multiplying the number of tons of first-class by 6 and the number of tons of second-class by 7.62, he arrived at a product which equaled approximately the number of cubic feet contained in these excavations, and therefore gave it as his opinion that first-class ore occupied 6 cubic feet per ton and second class ore 7.62 cubic feet per ton. These ratios were adopted by the Chancellor as a basis for determining the volume of ore removed from all the excavations from which the disputed ore had been taken, the evidence of petitioner upon this point being wholly rejected.

Petitioner contended in the Court of Appeals that Mr. Taylor had fallen into a number of errors as to what was shown by the record and had made some arithmetical

errors which, if correct, would necessarily require his ratio of 6 and 7.62 to be changed to 6.5 and 8.1.

Upon a petition for a rehearing petitioner labored very hard to make its contention plain upon this point. Before the filling of the petition for a rehearing it had been at some disadvantage because the record of ore extraction contained in petitioner's ore extraction books kept for the year 1915, was not available in the writing of petitioner's brief, nor upon the argument. It happened in this wise: These books at the trial were delivered to the clerk of the court, and the Chancellor directed him to impound them and keep them safe, and to permit them to be examined only upon the order of the Court, or in the presence of both of the parties. The clerk was so diligent in the performance of this order that he put these books away where they could not afterwards be found until after the decision of the Court of Appeals in this case. They are expressly a part of the record and made so by the certificate of the Chancellor, approving the record for use on appeal; but when petitioner came to write its brief these books could not be found. After the decision of the Court of Appeals affirming the judgment, the clerk found the books, and thereupon petitioner prepared a motion or petition to the Court of Appeals for a rehearing, and for an order requiring the clerk to send up the books. They were of great importance because they showed conclusively that in the year 1915 all the ore extracted on the Alliance side had not come from the three 600 stopes, but that on the contrary, approximately 1224.36 tons thereof had come from the 700-foot level below. This

tonnage by an error of Mr. Taylor had been compressed into the 600 stopes, and it was upon the hypothesis that these stopes produced this ore that came from the 700 level as well as the rest of the ore extracted in 1915 from the Alliance side, that Mr. Taylor's ratios were arrived at. The subtraction of this tonnage from the 600 stopes necessarily required, of course, an enlargement of 6 and 7.62.

The affidavit of the clerk proving that he had mislaid these books and that they had not been found until after the decision of the Court of Appeals, and the affidavits of Mr. Thomas Marioneaux and Mr. Frank Westcott were filed in support of the motion. The motion, however, was overruled, as likewise was the petition for a rehearing on the 29th of May, 1919. The affidavits will be found in a document filed in the cause in the Court of Appeals entitled "Motion to send up additional parts of the record and affidavits in support thereof."

The importance, of course, of being entirely correct as to the number of tons of first and second-class ore which came from the excavations in question is obvious, for no conclusion as to the number of cubic feet occupied by each ton can be deemed reliable unless the tonnage produced by the excavation is correctly determined. Our contention is that Mr. Taylor assumed that there came out of these excavations, over 1200 tons in excess of the tonnage actually produced by them. All we ask under this head is that the Court take the record for it, and having subtracted the tonnage which is shown without dispute not to have come from the excavations considered by Mr.

Taylor, determine what ratios should be used for first and second-class ore in place, accepting Mr. Taylor's own figures, making therein only such corrections as we point out must be made. This being done, we submit, that according to Mr. Taylor's method of calculation, first-class ore did not occupy less than 6.5 cubic feet per ton and second-class ore not less than 8.1 cubic feet per ton.

In the consideration of this subject we ask the Court to bear in mind and to pardon our repetition, that for the purposes of this case we must consider the Silver King Coalition Mines Company's property to consist of two mines: First, the Silver King mine lying to the north, and the Alliance mine (once called the K-K mine) lying to the south, it being remembered that all the ore on the Alliance side is part of the single ore body in controversy in this case, the whole ore body not being found within the Conkling claim, but the greater part of the ore body having been reached during the years in question in this cause from the 500, 600 and 700 levels on the Alliance side, these levels having been run principally within the Conkling ground. If the volume of ore removed from the ground in controversy had been determined by using the ratios 6.5 cubic feet per ton for first class and 8.1 cubic feet per ton for second class, the decree in favor of respondent would have been less by the sum of \$53,311.45. For the convenience of the Court we include under the cover of this brief our discussion of this subject in the petition for a rehearing filed in the Court of Appeals.

(a) On page 412 of the printed record, under the title "The Summary," Mr. Taylor sets down for 1914:

240.34 tons of first class.
2003.44 tons of second class.

Both these figures result from errors in addition and subtraction made by Mr. Taylor in the calculations preceding the Summary.

(b) Mr. Taylor's summary also contains the following statement:

1915: * * *

15,579.57 tons of second class.

The last tonnage above stated is assumed by Mr. Taylor to have come exclusively from the 600 stopes considered by him. The evidence proves affirmatively that 1224.36 tons of it were taken from the 700 level stopes.

According to Mr. Taylor's own figures the entire tonnage of second class ore extracted from the *Alliance side* in 1915 was 15,840 tons. Mr. Taylor deducts 260.43 tons, and assumes that the balance came from the three 600 stopes alone.

The record shows without dispute that 1224.36 tons of the total of 45,734 tons of second class ore produced by the entire mine in 1915, *as found by Mr. Taylor*, came from the 700 level on the *Alliance side*, and there must, therefore, be deducted from the 15,579.57 tons of second class under the year 1915, in Mr. Taylor's summary, this ore from the 700 level, leaving for 1915, from the 600 stopes, 14,355.21 tons of second class ore.

In our reply brief we called attention to Mr. Taylor's errors in addition and subtraction, in attempting to show that his conclusions were erroneous; but we did not point out specifically enough, perhaps, just what ratios Mr. Taylor himself would have been compelled to arrive at for first and second class ore if he had made the necessary corrections in his calculations.

We will next show our justification for saying that the of which there can be no dispute, and will then ascertain the ratios which result according to Mr. Taylor's method of determination.

We will next show our justification for saying that the evidence demands the subtraction of 1224.36 tons of second class ore from Mr. Taylor's 15,579.57 tons of second class given in his Summary under 1915, on page 412 of the printed record. Upon this point we will discuss only the undisputed testimony.

Mr. Humes (page 411 of the record), gave the number of cars of first class extracted from the King side in 1914, and they total 17,046 cars. The total of the number of cars of second class extracted from the King side in that year given by Mr. Humes is 89,249 cars.

Mr. Taylor, making two mistakes in addition, found that Mr. Humes' first class cars aggregate 17,048, and the second class 88,249.

We have tabulated Mr. Humes' testimony as to the number of first and second class cars of ore extracted from the King side in 1914, on page 21 of our opening brief, taken from page 300 of the printed record, and that Mr. Taylor was in error cannot be gainsaid.

In paragraph 6 on page 411 of the printed record (Taylor's testimony), we must change 17,958 to 17,956 cars of first class, and 94,524 to 95,528 cars of second class. It follows that the figures in the first paragraph on page 412, must also be changed. 94,524 becomes 95,528, and 1268 pounds to the car becomes 1254 pounds to the car of second class.

The next error in Mr. Taylor's figures is shown in this same paragraph. He gives the total ore extraction from the entire mine in 1914, according to the cost analysis sheet, and gives it correctly, as 77,439 tons, including both first and second class.

He deducts 59,907 tons of second class and gets a remainder of 18,532 tons for the first class shipped in the year 1914. This remainder ought to be 17,532. Mr. Taylor made a mistake in subtraction.

Mr. Taylor multiplies 18,532 by 2,000 and divides it by the cartage of first class, namely, 17,958 (which we have seen should be 17,956), and gets 2,063 pounds to the car of first class. Making the necessary correction we multiply 17,532 by 2,000, and divide it by the correct cartage of first class, 17,956, which gives us instead of 2063 pounds to the car of first class, 1952 pounds.

Mr. Taylor's figures in the second paragraph on page 412, now indisputably must be altered. For the moment we question nothing but his figures. He multiplies 233 cars by 2063 pounds, divides by 2,000, and arrives at 240.34 tons of first class in 1914.

Making the necessary corrections, we must multiply

233 by 1952 and divide by 2,000, which gives us 227.40 tons for the summary under 1914.

Again in the second paragraph on page 412, Mr. Taylor multiplies 3160 cars by 1268 pounds, and dividing by 2,000 gets 2003.44 tons of second class.

Making the correction, which we have seen above is necessary, we multiply 3160 by 1254 pounds, and dividing by 2,000, we get 1981.32 tons of second class, which must take the place of 2003.44 tons in Mr. Taylor's summary under 1914. (Page 412, printed record.)

To arrive at the tonnage which Mr. Taylor gives in his summary under the year 1915, (printed record, page 412), he takes the cost analysis sheet for this year, and finds that there were extracted from the *entire mine*, the King side plus the Alliance side,—

First class, 31,690 tons.

Second class, 45,734 tons.

Referring to Mr. Humes' testimony, Mr. Taylor says, and says correctly, that Mr. Humes gives the ore extraction in 1915, from the King side, as follows:

First class, 30,148 tons.

Second class, 29,891.82 tons.

Deducting the tonnage from the King side gives us the following ore extraction from the Alliance side, including of necessity, all stopes worked on the Alliance side in 1915:

First class, 1,542 tons.

Second class, 15,840 tons.

Mr. Taylor then deducts from the total first class on the Alliance side in this year 5.24 tons of first class and

260.43 tons of second class, finding thus that there came from the Alliance side in the year 1915, tonnage as follows:

First class, 1,536.76 tons.

Second class, 15,579.57 tons.

(See his summary under 1915, page 412 of printed record.)

It will be seen that Mr. Taylor's figures last given represent, according to his contention, *all the ore extracted in 1915, on the Alliance side*, except 5 cars of first class and 342 cars of second class, shown in Exhibit 48, (page 518 of the printed record) from places confessedly other than the 600 stopes or 700 stopes. Mr. Taylor reduces these cars to tons by calculations found in paragraph 2 on page 411 of the printed record.

It is now obvious that Mr. Taylor is wrong in crediting to the three 600 stopes, considered by him, 1,536.76 tons of first class and 15,579.57 tons of second class, *unless the evidence shows that all the ore which came from the Alliance side in 1915, disregarding the small deduction above noted, came from the 600 stopes.*

By a process of elimination Mr. Taylor finds the tonnage that came from the Alliance side in 1915, but this process of elimination did not enable him to find from what stopes on the Alliance side worked in this year this tonnage came.

We earnestly insist that the ore extracted on the Alliance side in 1915, did not come exclusively from the 600 stopes, and the three places from which came the five cars

of first class and the 342 cars of second class deducted by Mr. Taylor.

We submit that if any witness for either party undertakes to determine the cubic feet per ton occupied by the ore in place, by referring to the testimony as to the dimensions of a particular excavation, the burden is upon him to show where in the testimony the data is found for a finding as to the number of tons extracted from such excavation. This proposition is not based upon the general rule of law as to where the burden of proof rests as to the ultimate facts in the case. When we seek to demonstrate anything mathematically we must prove the correctness of our premises. We should not leave our premises in doubt. If we do our conclusions must be rejected.

If Mr. Taylor had had any personal knowledge as to the tonnage that came from the three 600 stopes, and had been examined as a witness with respect to such knowledge, and had given testimony upon his oath that all the ore extracted from the Alliance side in 1915, (except the small quantity deducted by him) came from the 600 stopes, we would not now be making this argument, because then the testimony upon the point we would admit was conflicting, but Mr. Taylor had no knowledge and did not pretend to testify from his knowledge.

A reading of his testimony (pages 410 and 411 of the printed record) shows that he assumed that all the ore on the Alliance side extracted in 1915, (except the small quantity which he deducted) came from the 600 stopes. He therefore must have assumed that the only stopes worked on the Alliance side in 1915, were these three 600

stopes. No witness in the case testified that these were the only stopes worked on the Alliance side in that year. Nothing in the evidence justifies such a conclusion or inference; on the contrary, there is positive and affirmative evidence that all the ore extracted on the Alliance side in 1915, did not come from the cavities considered by Mr. Taylor. Let us see if this statement is not supported by the record.

The record shows that during the course of the trial while Mr. James Humes was upon the witness stand he testified as follows:

"I have brought here the reports . . . for 1915, that Mr. Critchlow called for. . . . This document that I next hand you is my report to the General Manager for the year 1915. (Exhibit 92 marked by the reporter.)"

Referring to this exhibit, which is found at page 537 of the printed record, we discover that under the heading "Alliance section," there were taken from the 700 level in the year 1915, 10.49 tons of first class, and 1224.36 tons of second class.

Let it be noted right here that Mr. Taylor by his process of elimination ascertained without any reference to this report that the exact number of tons of *second class* extracted from the entire mine in 1915, was 45,734 tons. *the exact number of tons shown in Mr. Humes' report to the General Manager, called for and introduced at the suggestion of our adversaries.*

In this total we find 1224.36 tons coming from the 700

level, which tonnage, of course, was extracted entirely outside of the three stopes considered by Mr. Taylor.

It is incredible to us that the trial court had any doubt of the correctness of this report to the General Manager, or assumed that this 1224.36 tons of second class ore came from the 600 stopes. We do not believe Mr. Taylor would have had any doubt that this 1224.36 tons came from the 700 level and not from the 600 stopes, if his attention had been called to the report to the General Manager. We concede that his attention was not called to it, but it is a fact established in the case beyond controversy. It is evidence that ought not to be rejected. It is certain that if Mr. Taylor's attention had been called to it he would have deducted from the total given in his summary of second class ore for 1915, 1224.36 tons, and also would have deducted 10.49 tons of first class which came from the 700 level, according to Mr. Humes' report, from the total of 1536.76 tons of first class credited by Mr. Taylor to the 600 stopes for this year.

Mr. Humes' total here of 45,734 tons of second class from the *entire mine* in 1915, agrees exactly with Mr. Taylor's determination of second class tonnage for this year.

It does not seem to us to be fair or reasonable to adopt a conclusion upon this important question of space per ton occupied by the ore in place in the mine, by compressing this 1224.36 tons of ore from the stopes on the 700 level into the 600 stopes. The consequence of doing so works a great injustice to the appellant in this case. The extent of that injustice we will shortly demonstrate.

It is to be borne in mind that in 1912, the ground from which all the ore in controversy came was awarded by the solemn decree of the trial court to the appellant here. The ore now under discussion and reported in Mr. Humes' report to the General Manager, was mined in the year 1915, before the decision of the trial court had been reversed. *Mr. Taylor himself proves that the report is correct as to the total tonnage of second class ore extracted in 1915, from the entire mine.*

What possible motive can be suggested why Mr. Humes in his report to the General Manager of operations in 1915 should state that 1224.36 tons were mined off the 700 level on the Alliance side, if in fact this ore had been mined from the three 600 stopes considered in the testimony of Mr. Taylor? This report was brought into the Court and introduced in evidence at the suggestion of counsel upon the other side. It seems to us that it makes our contention incontestable that there must be deducted from the total of 15,579.57 tons of second class contained in Mr. Taylor's summary (page 412 of the printed record), 1224.36 tons, leaving, as before stated, 14,355.21.

We earnestly contend that Mr. Taylor's summary, given on page 412, should be reconstructed as follows:

1914:

227.40 tons of first class.
1981.32 tons of second class.

1915:

1,526.27 tons of first class.
14,355.21 tons of second class.

1916:

No first class.
1,655.50 tons of second class.

(For the purpose of our argument here we will assume the correctness of the tonnage given for 1916.)

Making the total production for those three years from the 600 stopes considered by Mr. Taylor, not exceeding 1753.67 tons of first class and 17,992.02 tons of second class.

It will be remembered now that Mr. Taylor testified that he ascertained by experiment the number by which to multiply the first class ore and the number by which to multiply the second class ore in order to fill the cavity, —183,523 cubic feet, minus one-seventh equals 157,306 cubic feet.

Now, adopting two numbers which have the same relation to each other approximately as 6 has to 7.62 (6.5 and 8.109), we find that the ore cavity, 157,306 cubic feet, is fully accounted for.

1753.67 tons of first class multiplied by 6.5 equals 11,398.85 cubic feet.

This leaves 145,907.15 cubic feet for the second class ore.

17,992.02 (tons of second class) multiplied by 8.109 equals 145,897.29, a difference of less than 10 cubic feet.

The appellant very earnestly submits to the Court that making the necessary corrections in Mr. Taylor's figures, and deducting the tonnage which came in 1915, from the 700 stopes, instead of the three 600 stopes considered by Mr. Taylor, it necessarily results that the appellant is entitled to a finding that first class ore occupied not less than 6.5 cubic feet to the ton, and second class ore not less than 8.109 cubic feet to the ton.

It does not seem to us that it is possible seriously to dispute the appellant's proposition that the Court should not allow the ratios of 6 and 7.62 to stand in the face of the indisputable fact that they have been arrived at by the number of errors in addition and subtraction, and by including in Mr. Taylor's ore cavity 1224.36 tons of ore which, beyond all reasonable controversy, did not come from the 600 stopes.

We conceive that this learned court has misapprehended our contention. Your Honors say:

"It is, however, difficult to believe that Mr. Brooks was either ignorant of the facts or in error in his testimony on this subject. . . . There was no suggestion by that company (the appellant) in the examination of Brooks or Taylor that the testimony as to the number of *tons* or as to the number of cubic feet in the 600 stope(s) was either false or inaccurate. Taylor took the number given by Brooks, made his proof on that basis, and now the King Company insists it is no proof because its witness was mistaken and the testimony he gave was erroneous."

We do not claim that Mr. Brooks' testimony was erroneous upon this subject, but we beg leave to point out that Mr. Brooks did not testify as to the number of *tons* of ore extracted from the 600 stopes. Neither did Mr. Taylor testify as to the number of *tons* contained in these stopes. He assumes, it is perfectly evident from the reading of his testimony, that all the ore extracted on the Alliance side in 1915, except 5 cars of first class and 342 cars of second class, came from the 600 stopes. There is not a syllable of testimony in the record as to the stopes from which all the ore extracted in 1915, came, except the general man-

ager's report for that year, and the ore extraction record books. Let us repeat, *that as to the total second class ore extracted on the Alliance side in 1915, Mr. Taylor finds it to be, within a half a ton, identical with the number of tons of second class ore as given in Mr. Humes' report, which includes the 1224.36 tons taken from the 700 level.*

We do not at this time ask this Honorable Court to reject any of the testimony of Mr. Brooks. We do not here ask the Court to reject a single statement of fact made by Mr. Taylor. For the purpose of the point we are attempting to make it is not necessary for us to do so. All that we ask under the heading we are now discussing is, that the corrections which we have pointed out be made in Mr. Taylor's calculations, and that there be subtracted from his second class tonnage from the 600 stopes in the year 1915, 1224.36 tons, plainly shown to have come from the 700 stopes.

It is true that Mr. Brooks "testified in much detail regarding the 600 stopes—that is to say, the stopes below the 500 level from which ore came out of the Conkling through the place where the tonnage was recorded in 1914, 1915 and 1916, * * * and that there were no other stopes, the material of which came on through the 600 level during those years."

There is nothing in the testimony of Mr. Taylor or Mr. Brooks inconsistent with the truth of the statement in the general manager's report as to the tonnage which came in 1915, from the 700 level. While Mr. Brooks testified that the excavations containing 183,523 cubic feet produced all the ore which went out along the 600 level,

he did not testify that all the ore that came out in 1915, came out along the 600 level. Ore from the 700 level, of course, did not come from the 600 stopes.

Not only is there nothing to dispute the statement in the general manager's report of ore taken from the 700 level in 1915, but there is testimony which corroborates it.

The testimony of Mr. Brooks, we concede—we not only concede it but we insist upon it—proves that all the material which came from the three 600 stopes considered by Mr. Taylor came from the 600 level. Ore coming from other places in 1915 did not come out of the 600 level, but came up from the 700 level.

Not only is there no testimony which throws any doubt upon the statement in the general manager's report that in 1915 the tonnage we have mentioned came from the 700 level, but there is much to corroborate Mr. Humes' report upon this point. All testimony which tends to show that other stopes were worked in 1915, besides the 600 stopes, is testimony tending to corroborate Mr. Humes' report as to the ore that came from the 700 level.

Now, bearing in mind that no ore came *from the 600*, according to Mr. Brooks' testimony, in 1915, except such as came from Mr. Taylor's three 600 stopes, designated as the "600 stope," "600 Middle" stope and "600 Top" stope, we call attention to the following testimony, all of which is wholly uncontradicted:

Mr. O'Neil testified:

(Referring to Exhibit 3.) "Here is the 704 drift. We were working in that some time the *latter part of 1915*, or the beginning of 1916, I think. The ore was taken out of

the 704 drift about February or March, 1916, I think. * * * We struck some good ore just before we quit the 704 raise stope. We quit working in the 704 raise stope at the time we got notice of the decision of the Court of Appeals. * * * The 604 (704) stope, I think, was about 50 or 60 feet above the 600 level. The ore was taken to the Silver Hill shaft."

"Referring to the map which shows * * * 700 stope, the 704 stope, I am familiar with all of those * * * I think we worked the 700 drift somewhere about the beginning of 1916. The top of the 700 drift stope is now accessible and entered very easily. * * * The 700 drift stope is about 8 feet above the track level and about 5 or 6 feet below, about 12 or 15 feet long. The streak of ore is about 18 inches or 2 feet wide at the widest point. Mr. Anderson and Mr. Brooks surveyed there after the decision of the Court of Appeals, and I told them how much waste there was in there." (Printed record, pages 262, 263, 264.)

The 700 drift stope, referred to by Mr. O'Neil above, as being about 8 feet above the track and about 5 or 6 feet below, is doubtless the "700 level drifting through ore," referred to by Mr. Brooks in his testimony. (Page 265 of printed record, line 25.)

Mr. Harry J. Humes said: That he went to work for the appellee in 1915, as shift boss on the Alliance side; that he never knew anything about the so-called Elephant stope. Proceeding, he said: "*Referring to the stopes below, generally spoken of as 'the 600,'* I will say that the 600 sill stope and the 600 middle stope were exhausted

when I went there as shift boss. The stopes worked under my supervision were the 600 top stope, the 704 top stope. The 704 drift stope was worked out. I kept a proper record of the number of cars that went out on my shifts.

* * * The ore that came from the 600, 700 and 900 would be taken up the Silver Hill shaft to the 500 level." (Printed record, page 268.)

Mr. Con O'Neil also testified that he took some ore in 1915, from the 700—in 1915 and 1916. "I do not know what part of it came from within the Conkling ground. The ore in the stopes from the 700 was about the same as that from the 600 stopes. *The ore extraction books show what came from the 700.*" * * *

Mr. Humes in his report of the operations ending December 31, 1915, makes specific reference under the heading "Alliance Section," to the ore body on the 200 level. He says:

"One (on) the 200 level the ore body looks better at the present time than at any time in the past."

Mr. Humes' testimony shows that the 200 level here referred to is the 700 of the Alliance. (See printed record, page 307.) Mr. Humes is undoubtedly here referring to the ore body from which he reports this 1224.36 tons of second-class ore came, in his tabulation of total second class ore extracted from the Alliance side.

In addition to all the foregoing testimony which shows that the 1224.36 tons of ore did not come from the three 600 stopes considered by Mr. Taylor, an examination of the appellant's ore extraction books for the year 1915,

discloses that there came from the 700 level on the Alliance side in that year 25 cars of first class ore and 1906 cars of second class ore.

Mr. James Humes, who was superintendent of the mine in that year, testified that in 1915, the *average* car of first class ore weighed 2098 pounds, and the average car of second class 1523 pounds. (Printed record, page 308.) According to this testimony, then, the ore extraction books show approximately 26 tons of first class and approximately 1,450 tons of second class from the 700 level on the Alliance side in 1915.

These ore extraction books are Exhibits 123 to 139, and were made a part of the record in this cause, as will be seen by reference to the certificate of the trial judge approving the statement of the evidence for use on the appeal. The books, however, were not actually sent up to this court as a part of the record, because the clerk of the trial court mislaid these exhibits, and they were not found until after the decision of the cause upon this appeal. The appellant has prepared a motion requesting this Honorable Court to require these books to be forwarded to this Court in order that they may be examined so that there shall be left in the mind of the Court no manner of doubt that all the ore extracted from the Alliance side in 1915, did not come from the excavations considered by Mr. Taylor.

The adoption of 6.5 cubic feet per ton for first class, and 8.109 cubic feet for second class ore will result in the reduction in the amount of the judgment equal to \$53,311.45. (See Addenda.)

We submit that the Court of Appeals should have sent for the Exhibits 123 to 139, since they were actually a part of the record in the case, and if they show, as we insist they do, that over 1224 tons of the ore extracted in 1915, from the Alliance side, came from the 700 level, and not from the 600 stopes as assumed by Mr. Taylor, they show that Mr. Taylor's ratios, 6 and 7.62, should have been altered to 6.5 and 8.1 as contended by petitioner, and the whole volume of ore extracted recalculated accordingly.

In conclusion, your petitioner begs leave to add that it feels itself greatly aggrieved by the judgment depriving it of the title to the ore in controversy; by the rejection of all the evidence in respect to the value of the ore, and by the refusal of the Court of Appeals to recalculate the volume of ore in controversy in view of the very evident mistakes upon which volume was determined.

Wherefore, it humbly prays that this Honorable Court may be pleased to grant a writ of certiorari in this case to the Circuit Court of Appeals for the Eighth Circuit, to bring up this case to this Honorable Court, and that thereupon this Honorable Court will reverse the decree of the Circuit Court of Appeals and affirm the first decree entered in this cause by the former Judge of the District Court, Hon. John A. Marshall, wherein the ground in controversy and all the ore in question is declared to be the property of your petitioner, or that this Court will, at least, if it conceives that said decree was properly reversed, modify the decree of the Court of Appeals by taking as the basis for the ascertainment of

the volume of the ore removed 6.5 cubic feet per ton for first class and 8.1 cubic feet per ton for second class, and for the determination of the value of the ore per ton the metallic contents of the K-K shipments, subtracting from \$542,222.58 the amount of the decree entered by the Chancellor the sum of \$366,220.22, leaving \$176,002.36 as the amount of the decree; and your petitioner will ever pray.

All of which is most humbly and most respectfully submitted.

Curtis H. Lindley.....
W. H. Dickson.....
James Harrison.....
A. C. Ellis Jr.....
P. G. Lucas.....

Solicitors for Petitioner.

We acknowledge service of sufficient copies of the foregoing brief to be filed in support of petitioner's application for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit, and stipulate and agree that the same is served upon us within the time granted by us by our stipulation heretofore made.

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Solicitors for Respondent.

Addenda.

Alteration of figures caused by taking first class ore at 6.5 c. f. and second class ore at 8.1 c. f. per ton, and by taking, for ore of the same metallic contents as the K-K lots, the average prices received for metals. (Pr. Rec. p. 474, Court's findings.)

1907.

659.155 K-K 1st class at 6.5 c. f.....	\$ 4,284.50
724.68 K-K 2d class at 8.10 c. f. or 252.07 concentrates	5,869.90
	\$10,154.40

50,000—10,154 equals \$39,846 1st class and 2d class.

In equal tonnage this supplies at 6.5 c. f. for 1st class and 8.1 c. f. for 2d class.

2,729.17 1st class.

2,729.17 2d class or 949.27 tons concentrates.

949.27 tons at 31.9% equals 302.81 slimes.

Value of Product:

2729.17 tons at \$26.22.....	\$71,558.84	
949.27 tons at 32.80.....	31,136.05	
302.81 tons at 3.85.....	1,165.81	\$103,860.70

Add amount received for K-K shipment per report.....

\$ 31,918.87

Total values

\$135,779.57

Less Costs:

Mining 6842.17 tons at \$4.50....	\$ 30,789.76	
Milling 3453.85 tons at \$1.10....	3,799.24	
Sampling and tramming 4589.66 tons at \$0.421.....	1,932.25	
Development	4,335.59	\$ 70,562.70
Debit from May 1st, 1907.....	29,705.86	
		<hr/>
		\$ 65,216.87

1908.

Volume 37.120 c. f.

1st class one-third.....	1635.24 tons
2d class two-thirds.....	3270.48 tons
	1137.55 tons concentrates
Slimes at 18.05%.....	205.32

Value of Product:

1,635.24 tons at \$20.26.....	\$33,129.96
1,137.55 tons at 25.68.....	29,212.28
205.32 tons at 3.44.....	706.30
	<hr/>
	\$63,048.54

Less Costs:

Mining 4905.72 tons at \$4.50....	\$22,075.74	
Milling 3270.48 tons at \$1.10.....	3,597.53	
Sampling and tramming 2772.79 tons at \$0.42.....	1,167.34	
Development	4,161.16	\$31,001.77
		<hr/>
Balance		\$32,046.77

Page 475, line 19, Printed Record.

1909.

1226.4 tons first class at 6.5 c. f.....	\$ 7,971.60
9853.8 tons first class at 8.10 c. f.....	79,815.78
	<hr/>
Total c. f. accounted for by cars 1909 and 1910.	\$87,787.38

114,557.1 e. f. minus 87,787.38 equals 26,769.72 e. f. of ore remaining in cavity.

26,769.72 e. f. at 8.91% equals 2,385.18 e. f. 1st class.

26,769.72 e. f. at 91.09% equals 24,384.53 e. f. 2nd class—
8-10 equals 3,010.43 tons.

2,385.18 e. f. divided by 6.5 e. f. per ton equals 366.95 tons 1st class (cavity).

3,010.43 tons divided by 2.875 (ratio of concentrates) equals 1,047.10 tons.

1909.

1st class accounted for, cars....	928.2	
1st class accounted for by cavity	366.95	
	<hr/>	
	1,295.15	
1,295.15 tons 1st class at \$21.73 per ton		\$ 28,143.60
8,952 cars 2nd class equals 7,385.4 tons.		
7,385.4 tons divided by 2.875 (ratio concentrates) equals, tons	2,568.83	
Tons accounted for by cavity (cons.)	1,047.10	
	<hr/>	
	3,615.93	
3,615.93 tons cons. at \$27.12....		\$ 98,064.02
		<hr/>
		\$126,207.62

Less Costs:

Mining 11,690.95 tons at \$4.50..	\$ 52,609.28	
Milling 10,395.8 tons at \$1.10...	11,435.38	
Sampling and tramming 4,911.08 tons at \$0.42.....	2,067.56	
	190.00	
	380.00	
	210.00	
	120.00	67,012.22
	<hr/>	
Balance		\$ 59,195.40

Page 476, of Printed Report, 14th line from bottom.

1910.

858.57 tons concentrates at \$27.63 per ton....	\$ 23,722.28
298.2 tons 1st class at \$22.10 per ton.....	6,590.22
	<hr/>
	\$ 30,312.50
Less deductions per report.....	\$ 15,651.94
	<hr/>
Balance	\$ 14,660.56

Page 477, 5th line.

1913.

80 multiplied by 2100 divided by 2000 multiplied by 6.5
equals 546. c. f. 1st class.

174 multiplied by 1650 divided by 2000 multiplied by 8.10
equals 1162.75 c. f. 2nd class.

1st class 31.95%.

2nd class, 68.05%.

31.95% of 3861 divided by 6.5...189.78 tons first class

68.05% of 3861 divided by 8.1...324.37 tons second class

112.82 tons concentrates

Values:

189.78 tons at \$22.87.....	\$ 4,340.26
112.82 tons at 28.43.....	3,207.47
	<hr/>
	\$ 7,547.73

Less Costs:

Mining 514.15 tons at \$4.50....	\$ 2,313.68
Milling 324.37 tons at \$1.10.....	356.81
Sampling and tramming 302.50 tons at \$0.421.....	127.35
Development	1,944.00
	<hr/>
Balance	\$ 4,741.84
	<hr/>
	\$ 2,805.89

Page 478, first line of Printed Record.

1914.

682.85 tons at 6.5 c. f.	\$ 4,438.52
1,772 tons at 8.1 c. f.	14,353.20
	<hr/>
	\$ 18,791.72

Excavation in Conkling	18,246 c. f.
Less waste	2,606 c. f.
	<hr/>
	15,640 c. f.

15,640 divided by 18,791.72 equals 83.22%.

682.85 multiplied by 83.22%	568.26 tons first class
1772 multiplied by 83.22%	1474.66 tons second class
	512.92 tons concentrates

Values:

568.26 tons at \$20.66	\$ 11,740.25
512.92 tons at 25.53	13,094.84
	<hr/>
	\$ 24,835.09

Less Costs:

Mining 2042.92 tons at \$4.50	\$ 9,193.14
Milling 1474.66 tons at \$1.10	1,622.13
Sampling and tramming 1081.18 tons at \$0.421	455.18
Development	6,457.00
	<hr/>
	17,727.45
Balance	<hr/>
	\$ 7,107.64

Page 478 of Printed Record, 9th line from bottom.

1915.

358.84 tons at 6.5 c. f.	\$ 2,332.46
3621.39 tons at 8.1 c. f.	29,333.25
	<hr/>
	\$ 31,665.71

Conkling excavation	42,242	e. f.
Less waste 1/7	36,208	e. f. of ore
36,208 divided by 31,665.71	114.3%	
358.84 multiplied by 114.3%	410.15	tons first class
3,621.39 multiplied by 114.3%	4139.24	tons second class
	1439.73	concentrates

Value:

410.15 tons at \$24.48	\$ 10,040.47
1439.73 tons at 30.99	44,617.23
	<hr/>
	\$ 54,657.70

Loss Costs:

Mining 4549.39 tons at \$4.50	\$ 20,472.25	
Milling 4139.24 tons at \$1.10	4,553.16	
Sampling and tramming 1849.88		
tons at \$0.421	778.80	
Development	2,078.00	27,882.21
	<hr/>	<hr/>
Balance		\$ 26,775.49

Page 479 of Printed Record.

1916.

Excavation	16,410	e. f.
Less waste	2,344	e. f.
	<hr/>	
Ore cavity	14,066	
14,065.7 divided by 8.10	1,736.50	tons second class
	604	tons concentrates

Values:

604 tons at \$42.88	\$ 25,899.52
Less Costs:	
Mining 1736.50 tons at \$4.50	\$ 7,814.25
Milling 1736.50 tons at \$1.10	1,910.15
Sampling and tramming 604 tons	
at \$0.421	254.28
Development	1,150.00
	<hr/>
Balance March, 1916	\$ 14,770.84

SUMMARY.

	Values per Findings	Values as Altered	Amount of Reductions	Simple Interest at 8% to Mar. 1, 1918
1907	\$121,576.28	\$ 65,216.87	\$ 56,359.41	\$ 45,838.98
1908	95,147.74	32,046.77	63,100.97	46,274.04
1909	130,971.86	59,195.40	71,776.46	46,893.95
1910	24,224.84	14,660.56	9,564.28	5,483.52
1913	6,325.28	2,806.89	3,519.39	1,173.12
1914	15,432.99	7,107.64	8,325.35	2,109.09
1915	32,818.47	26,775.49	6,042.98	1,047.45
	<hr/> \$426,497.46	<hr/> \$207,808.62	<hr/> \$218,688.84	<hr/> \$148,820.15
1916	\$ 13,592.08	\$ 14,770.84	\$* 1,178.76	\$* 110.01
	<hr/> \$440,089.54	<hr/> \$222,579.46	<hr/> \$217,510.08	<hr/> \$148,710.14
Add interest			<hr/> \$148,710.14	
Total amount of reduction			<hr/> \$366,220.22	
\$42,222.58—\$366,220.22 equals \$176,002.36.				

Note: Amounts marked * are increases.

Alteration of figures caused by taking for the prices per ton of ore or concentrates the average prices received for ore of the same metallic contents as the K-K lots.

Page 474, line 10, of Printed Record.
1907.

Values of Product:

2975.25 tons at \$26.22.....	\$ 78,011.05	
1034.87 tons at 32.80.....	33,943.73	
330.01 tons at 3.85.....	1,270.83	\$113,225.86

Add amount received for K-K shipments per report.....		31,918.87
		<u>\$145,144.73</u>
		\$ 73,187.73

Balance	\$ 71,957.00
-------------------	--------------

Page 474, line 34, of Printed Report.
1908.

Values of Product:

1747.65 tons at \$20.26.....	\$ 35,407.39	
1215.76 tons at 25.68.....	31,220.71	
219.45 tons at 3.44.....	754.90	\$ 67,383.00

Less costs per report.....		32,846.85
----------------------------	--	-----------

Balance	\$ 34,536.15
-------------------	--------------

Page 475 of Printed Report, 6th line from bottom of page.
1909.

1405.7 tons 1st class at \$21.73 per ton.....	\$ 30,545.86
3904.05 tons conc. at \$27.12 per ton.....	105,877.83
	<hr/>
	\$136,423.69
Less deductions per report.....	\$ 72,313.37
	<hr/>
	\$ 64,110.32

Page 476 of Printed Report, 14th line from bottom.
1910.

858.57 tons concentrates at \$27.63 per ton....	\$ 23,722.28
298.2 tons 1st class at \$22.10 per ton.....	6,590.22
	<hr/>
	\$ 30,312.50
Less deductions per report.....	\$ 15,651.94
	<hr/>
Balance	\$ 14,660.56

Page 477, line 12, of Printed Report.
1913.

Value:

203.09 tons at \$22.87.....	\$ 4,644.66
120.63 tons at 28.43.....	3,429.51
	<hr/>
	\$ 8,074.17
Less deductions per report.....	\$ 4,936.31
	<hr/>
Balance	\$ 3,137.86

Page 478, line 10, of Printed Report.
1914.

Values:

610.81 tons at \$20.66.....	\$ 12,619.33
547.31 tons at 25.53.....	13,972.82
	<hr/>
	\$ 26,592.15
Less deductions per report.....	\$ 18,404.96
	<hr/>
Balance	\$ 8,187.19

Page 479, 1st line, of Printed Report.
1915.

Values:

436 tons at \$24.48.....	\$ 10,673.28
1530.4 tons at \$30.99.....	47,427.09
	<hr/>
	\$ 58,100.37
Less deductions per report.....	\$ 29,507.85
	<hr/>
Balance	\$ 28,592.52

Page 479, line 17, of Printed Report.
1916.

Value:

642.1 tons at \$42.88.....	\$ 27,533.24
Less deductions per report.....	11,758.03
	<hr/>
Balance	\$ 15,775.21

SUMMARY.

	Values per Report	Values as Altered	Amount of Reduction	Simple Interest at 8% to Mar. 1, 1918
1907	\$121,576.28	\$ 71,957.00	\$ 49,619.28	\$ 40,357.01
1908	95,147.74	34,536.15	60,611.59	44,448.50
1909	130,971.86	64,110.32	66,861.54	43,682.87
1910	24,224.84	14,660.56	9,564.28	5,483.52
1913	* 6,325.28	3,137.85	3,187.43	1,062.47
1914	15,432.99	8,187.19	7,245.80	1,835.60
1915	32,818.47	28,592.52	4,225.95	732.50
	<hr/>	<hr/>	<hr/>	<hr/>
	\$426,497.46	\$225,181.59	\$201,315.87	\$137,602.47
1916	\$ 13,592.08	\$ 15,775.21	\$* 2,183.13	\$* 203.75
	<hr/>	<hr/>	<hr/>	<hr/>
	\$440,089.54	\$240,956.80	\$199,132.74	\$137,398.72
Add Interest			\$137,398.72	
	<hr/>	<hr/>	<hr/>	<hr/>
Total amount of reduction			\$336,531.46	
\$542,222.58—\$336,531.46 equals			\$205,691.12.	

Note.—Amounts marked * are increases.

See the following tabulation:

Alteration of figures caused by taking first class ore at 6.5 c. f. and second class ore at 8.1 c. f. per ton instead of 6.0 c. f. and 7.62 c. f. (Pr. Rec., p. 474, Court's findings.)

1907.

659.155	K. K. 1st class@6.5 c. f.....	\$ 4,284.50
724.68	K. K. 2nd class@8.10 c. f. or.....	5,869.90
252.07	tons concentrates.	

\$10,154.40

50,000-10,154-39,846 1st and 2nd class.

In equal tonnage this supplies at 6.5 c. f. for 1st class and 8.1 c. f. for 2nd class.

2,729.17 1st class.

2,729.17 2nd class or 949.27 tons concentrates.

949.27 tons at 31.9%—302.81 tons slimes.

Value of product:

2,729.17 tons at \$38.72.....	\$105,673.46	
949.27 tons at \$44.81.....	42,536.78	
302.81 tons at \$3.85.....	1,165.81	\$149,376.05

Add amount received for K. K. shipments per report.....

\$ 31,918.87

Total values

\$181,294.92

Less costs:

Mining 6,842.17 tons at \$4.50....	\$ 30,789.76	
Milling 3,453.85 tons at \$1.10....	3,799.24	
Sampling and Trammings 4,589.66 tons at \$0.421	1,932.25	
Development	4,335.59	
Debit from May 1st, 1907.....	29,705.86	\$ 70,562.70
Balance January 1st, 1908....		\$110,732.22

Page 474 of printed record.

1908.

Volume 37,120 cu. ft.

1st class one-third.....	1,635.24 tons
2nd class two-thirds.....	3,270.48 tons
	1,137.55 tons concentrates
Slimes at 18.05%.....	205.32

Value of product:

1,635.24 tons at \$46.42.....	\$ 75,907.84
1,137.55 tons at \$37.93.....	43,147.27
205.32 tons at \$ 3.44.....	706.30
	<hr/>
	\$119,761.41

Less Costs:

Mining 4,905.72 tons at \$4.50....	\$ 22,075.74
Milling 3,270.48 tons at \$1.10....	3,597.53
Sampling and Trammings 2,772.79	
tons at \$0.42.....	1,167.34
Development	4,161.16
	<hr/>
Balance	\$ 88,759.64

Page 475, line 19, printed record.

1909.

1,226.4 tons first class at 6.5 c. ft.....	7,971.6
9,853.8 tons first class at 8.10 c. ft.....	79,815.78

Total c. f. accounted for by cars 1909 and 1910 87,787.38
 114,557.1 cu. ft. minus 87,787.38 equals 26,769.72 c. f. of
 ore remaining in cavity.

26,769.72 cu. ft. at 8.91% equals	
2,385.18 cu. ft. 1st class.	
26,769.72 cu. ft. at 91.09% equals	
24,384.53 cu. ft. 2nd class—8.10—	3,010.43 tons.
2,385.18 cu. ft. divided by 6.5 cu. ft. per ton equals	
366.95 tons 1st class (cavity).	
3,010.43 tons divided by 2,875 (ratio of concentrates)	
equals 1,047.10 tons.	

13

1909.

1st class accounted for, cars....	928.2	
1st class accounted for by cavity.	366.95	
	<hr/>	
	1,295.15	
1,295.15 tons 1st class at \$40.79 per ton		\$ 52,829.16
8,952 cars 2nd class equals 7,385.4 tons.		
7,385.4 tons divided by 2.875 (ratio concentrates) equals (tons)	2,568.83	
Tons accounted for by cavity (cons.)	1,047.10	
	<hr/>	
	3,615.93	\$135,199.62
		<hr/>
3,615.93 tons cons. at \$37.39 per ton		\$188,028.78

Less Costs:

Mining 11,690.95 tons at \$4.50...	\$ 52,609.28	
Milling 10,395.8 tons at \$1.10...	11,435.38	
Sampling and Tramming 4,911.08 tons at \$0.42	2,067.56	
	190.00	
	380.00	
	210.00	
	120.00	\$ 67,012.22
	<hr/>	

Balance January 1, 1910.....	\$121,016.56
------------------------------	--------------

Page 476 of printed record.

1910.

No alteration.

1913.

Page 477, 5th line.

80x2100 divided by 2000x6.5	546	c. f. first class
174x1650 divided by 2000x8.10	1,162.75	c. f. second class
1st class	31.95	%
2nd class	68.05	%
31.95% of 3861 divided by 6.5	189.78	tons first class
68.05% of 3861 divided by 8.1	324.37	tons second class
	112.82	tons concentrates

Values:

189.78 tons at \$39.61	\$ 7,517.18
112.82 tons at \$26.67	3,008.90
Total	\$ 10,526.08

Less Costs:

Mining 514.15 tons at \$4.50	\$ 2,313.68
Milling 324.37 tons at \$1.10	356.81
Sampling and Trammings 302.50 tons at \$0.421	127.35
Development	1,944.00
	\$ 4,741.84
Balance December 31, 1913	\$ 5,784.24

Page 478, first line of printed record.

1914.

682.85 tons at 6.5 c. f.	4,438.52
1,772 tons at 8.1 c. f.	14,353.20
	18,791.72
Excavation in Conkling	18,246 c. f.
Less Waste	2,606
	15,640
15,640 divided by 18,791.72	83.22 %
682.85x83.22%	568.26 tons first class
1,772x83.22%	1,474.66 tons second class
	512.92 tons concentrates

Values:

568.26 tons at \$35.42.....	\$ 20,127.76
512.92 tons at \$22.28.....	11,427.85
Total ..	<u>\$ 31,555.61</u>

Less Costs:

Mining 2,042.92 tons at \$4.50....	\$ 9,193.14
Milling 1,474.66 tons at \$1.10....	1,622.13
Sampling and Trammig 1,081.18 tons at \$0.421	455.18
Development	6,457.00
	<u>\$ 17,727.45</u>
	<u>\$ 13,828.16</u>

Page 479 of printed record.
1916.

Excavation	16,410 c. f.
Less waste	2,344 c. f.

Ore cavity	14,066 c. f.
14,065.7 divided by 8.10.....	1,736.50 tons 2nd class 604 tons concentrates

Values:

604 at \$39.48.....	\$23,845.92
---------------------	-------------

Less Costs:

Mining 1,736.50 tons at \$4.50....	\$ 7,814.25
Milling 1,736.50 tons at \$1.10....	1,910.15
Sampling and Trammig 604.0 tons at \$0.421.....	254.28
Development	1,150.00
	<u>\$ 11,128.68</u>
	<u>\$ 12,717.24</u>

Page 478 of printed record, 9th line from bottom.

1915.

358.84 tons at 6.5 c. f.....	2,332.46	
3,621.39 tons at 8.1 c. f.....	29,333.25	
	<u>31,665.71</u>	
Conkling Excavation	42,242	c. f.
Less Waste 1/7	36,208	c. f. of ore
36,208 divided by 31,665.71.....	114.3	%
358.84x114.3%	410.15	tons 1st class
3,621.39x114.3%	4,139.24	tons 2nd class
	1,439.73	concentrates

Values:

410.15 tons at \$36.77.....	\$ 15,081.21
1,439.73 tons at \$30.25.....	43,551.83
Total	<u>\$ 58,633.04</u>

Less Costs:

Mining 4,549.39 tons at \$4.50...	\$ 20,472.25	
Milling 4,139.24 tons at \$1.10...	4,553.16	
Sampling and Tramming 1,849.88 tons at \$0.421	778.80	
Development	2,078.00	\$ 27,882.21
	<u></u>	<u>\$ 30,750.83</u>

SUMMARY.

	Values per Findings	Values as Altered	Amount of Reduction	Simple Int. at 8% to Mar.1, 1918
1907.	\$121,576.28	\$110,732.22	\$ 10,844.06	\$ 8,820.10
1908.	95,147.74	88,759.64	6,388.10	4,684.63
1909.	130,971.86	121,016.56	9,955.30	6,504.00
1910.	No alteration.			
1913.	6,325.28	5,784.24	541.04	180.34
1914.	15,432.99	13,828.16	1,604.83	406.53
1915.	32,818.47	30,750.83	2,067.64	358.39
1916.	13,592.08	12,717.24	874.84	81.65
	<hr/> \$415,864.70	<hr/> \$383,588.89	<hr/> \$ 32,275.81	<hr/> \$ 21,035.64
Add Int.			\$ 21,035.64	
			<hr/> \$ 53,311.45	

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

SILVER KING COALITION MINES COMPANY, a Corporation, Petitioner, v. CONKLING MINING COMPANY, a Corporation.	}	No. 489.
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ON A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SUGGESTIONS OF THE UNITED STATES RELATIVE TO THE GRANTING OF THE WRIT.

Comes now the Solicitor General, on behalf of the United States, at the request of the Secretary of the Interior, and makes the following suggestions relative to the granting of a writ of certiorari in the above-entitled cause:

The suit which is one to quiet title, arose in the District of Utah and involves the construction of a patent issued February 3, 1902, for the Conkling lode mining claim, survey lot No. 689, pursuant to the Federal mining laws, sections 2318, 2346, Revised Statutes.

The decision of the Circuit Court of Appeals appears to lay down, among others, the following propositions:

(1) That the reference contained in the mineral patent to the field notes of the official survey and to the survey lot number did not make the field notes and the calls therein, including a description of the posts at each corner of the claim, a part of the patent description.

(2) That parol testimony as to the position of the official monuments was incompetent.

(3) That section 2327, Revised Statutes, as amended by the act of April 28, 1904 (33 Stat. 545), declaring that the official survey monuments at all times shall constitute the highest authority, and that in case of any conflict between monuments and patent descriptions the monuments on the ground shall govern, and as well the general rule that fixed monuments prevail over courses and distances, were inapplicable, in the case as presented.

During the period from 1891 to 1904 it was the practice of the Land Department in issuing patents to mention only the initial monument and the tie monument, and not to mention the other monuments of the mining claim. Thus it is brought about that only one or two of the survey monuments are specifically mentioned and described in the patents of that period. Both the law (sec. 2325, Revised Statutes) and the regulations contemplated and required that the survey boundaries of the mining claim should be distinctly marked by permanent monuments upon the ground. During said period, according to the

annual reports of the General Land Office, upwards of 20,000 mineral patents were issued. In the main said patents were based upon special mineral surveys, and in many, no doubt, the course and distance calls may vary to a greater or lesser extent from the fixed monuments described in the field notes and established and found on the ground. In all such cases, under the doctrine of the decision of the Circuit Court of Appeals in this case, it would appear that the metes and bounds calls contained in the patent will govern, and not the monuments found upon the ground, a description of which does not appear on the face of the patent.

Since September, 1904, the Land Department has conformed its practice to and followed the mandate of the aforesaid act of April 28, 1904 (33 Stat. 545), without regard to the fact that a particular claim may have been patented before the date of said act. Furthermore, in proceedings arising in said department, resort is constantly had to the field notes, to the official plat, and to parol evidence for the purpose of ascertaining and definitely determining the locus on the ground of the established survey monuments in order to identify and define patented areas. Occasion arises for such action in connection with the survey and patenting of adjoining mining claims and when segregating claims patented theretofore upon the subdivisional survey of townships. See *Sinnott v. Jewett*, 33 L. D. 91; *Drogheda and West Monroe Extension Lode Claims*, 33 L. D. 183; *United States Mining Co. v. Wall*, 39 L. D. 546; *Wasatch*

Mines Co., 45 L. D. 10; *Alaska United Gold Mining Co. v. Cincinnati-Alaska Mining Co.*, 45 L. D. 330.

From the foregoing it is apparent that the decision of the Circuit Court of Appeals in the present case leaves the Land Department in great uncertainty both as to the amount of land granted in the patents issued during the period from 1891 to 1904, and as to its policy and procedure in proceedings involving such patents.

Moreover, in those reserved areas where the mining and other public land laws do not now run, the United States as owner has a direct and special interest in the question as to whether lands outside of the monumental lines of patent claims, but within the course and distance calls, have passed under the grant. Government officials in such areas are in duty bound to see that lands belonging to the United States are not unlawfully claimed or interfered with.

It is apparent, therefore, that the question involved is one of general public interest and one in which the United States has a direct and special interest. Wherefore the United States respectfully begs leave to join in the request that a writ of certiorari issue in this case.

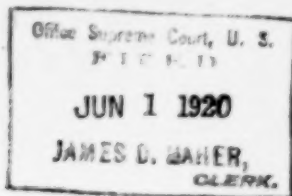
ALEX. C. KING,
Solicitor General.

OCTOBER, 1919.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

~~No. 489.~~ 158

SILVER KING COALITION MINES COMPANY, A COR-
PORATION, PETITIONER,

vs.

CONKLING MINING COMPANY, A CORPORATION, RE-
SPONDENT.

AFFIDAVITS AND ARGUMENT ON BEHALF OF THE
PETITIONER IN OPPOSITION TO RESPONDENT'S
MOTION TO REVOKE THE WRIT OF CERTI-
ORARI.

W. H. DICKSON, ✓
A. C. ELLIS, JR., ✓
CURTIS H. LINDLEY, ✓
R. G. LUCAS, ✓
THOS. MARIGNEAUX, ✓
Attorneys for Petitioner.

Al

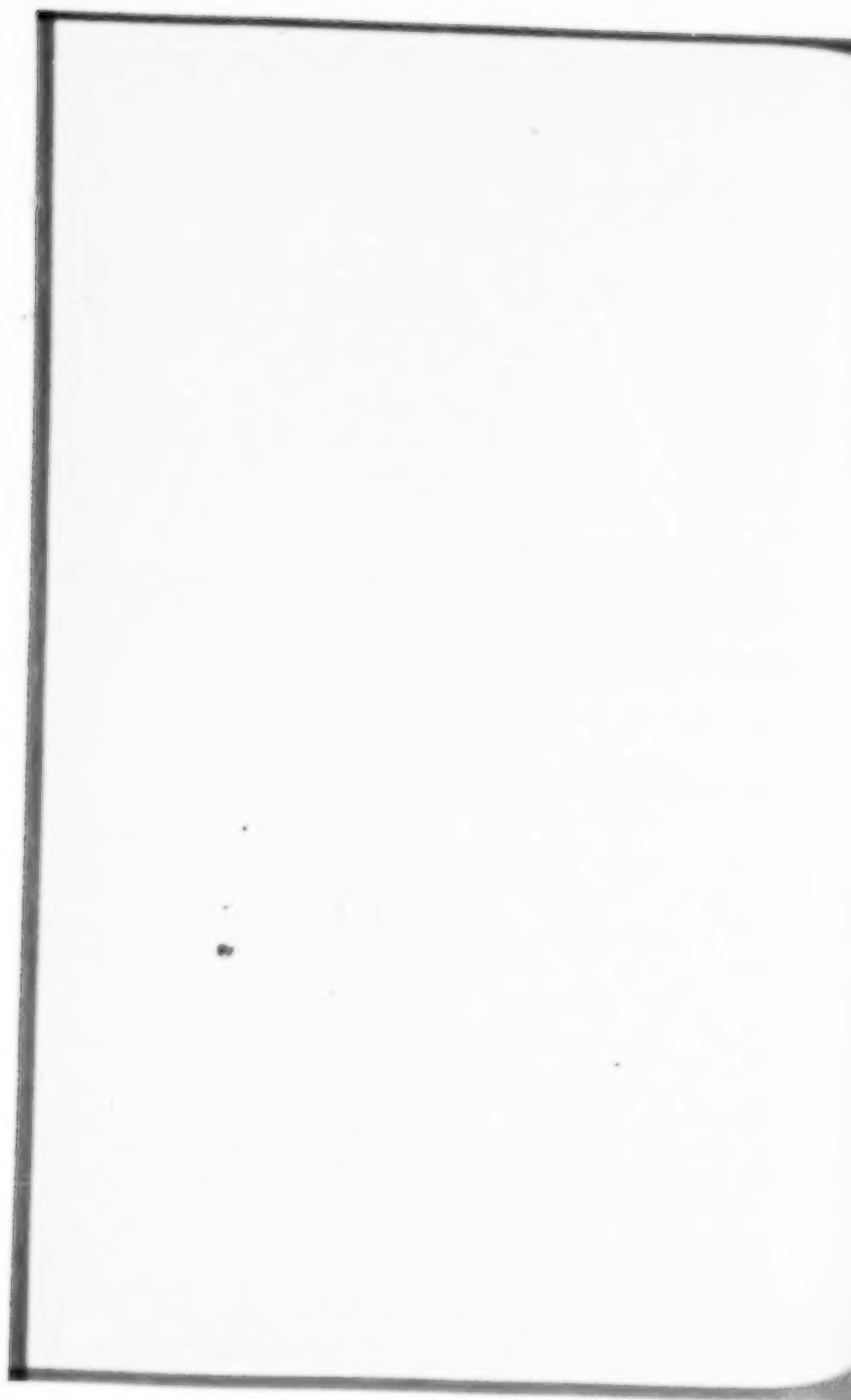
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IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1919.

No. 489.

SILVER KING COALITION MINES COMPANY, A CORPORATION, PETITIONER,

vs.

CONKLING MINING COMPANY, A CORPORATION, RESPONDENT.

Now comes the Silver King Coalition Mines Company, by its solicitors, and presents to this honorable court in opposition to the pending motion of the respondent for the vacation and annulment of the order of this court of October 20, 1919, allowing the issuance of a writ of certiorari to the Circuit Court of Appeals of the United States for the Eighth Circuit, the following affidavits and a brief argument in answer to the statements of the respondent and its contentions in the premises:

Affidavit of W. Mont Ferry.

DISTRICT OF COLUMBIA, D.C.

W. Mont Ferry, being first duly sworn, on his oath says that he is a citizen of the United States, over the age of 21 years, and a resident of the State of Utah. Affiant further says that before his visit to Washington in company with Mr. A. C. Ellis, Jr., one of the solicitors of petitioner, in August, 1919, he was commissioned by the board of directors of the petitioner company to accompany Mr. Ellis for the purpose of drawing to the attention of the Land Department of the Government of the United States the decision of the Court of Appeals in the case entitled "Conkling Mining Company, a corporation, appellant, vs. Silver King Coalition Mines Company, appellee, No. 3977," in the said Court of Appeals, with reference to the effect of the monuments erected upon the ground to mark the boundaries of patented mining claims and the calls in patents for such claims and with reference to the decision of that court in respect of the extralateral rights of the locator upon veins crossing the side-line of mining claims.

Affiant further says that he was at that time and had been since June, 1919, a managing director of petitioner company.

Affiant further says that the directors of the said Silver King Coalition Mines Company had been informed by their solicitors in said case that the decision of the United States Circuit Court of Appeals therein in respect of the boundaries of mining claims was contrary to the practice in the Land Department of the United States and if adhered to would probably be found to be embarrassing to the officers of the Government in the disposition of its mineral lands, and that in all probability it would be possible to induce the Land Department, through the Department of Justice, to intervene in

the petitioner's application for a writ of certiorari in said cause to the United States Circuit Court of Appeals for the Eighth Circuit with a view of having the decision of that court re-examined, particularly with reference to the effect of a conflict between the calls of a patent to a mineral claim and the monuments, upon the ground erected at the time of the patent surveyed.

Affiant further says that it was recognized by the board of directors of the petitioner company that it would probably be necessary to employ competent local counsel in Washington, D. C., to impress upon the Land Department of the Government, and perhaps upon the Department of Justice, the importance of the decision of the United States Circuit Court of Appeals upon the questions above referred to, and affiant was therefore authorized to employ such counsel as he should deem necessary or advisable. Affiant further says that he received from the board of directors of the petitioner company no specific directions with respect to limiting or prescribing the activities or functions of counsel with respect to the matter under consideration, but was only directed generally to employ such counsel as he deemed necessary. Affiant further says that upon arriving in Washington he and Mr. A. C. Ellis, Jr., one of the solicitors for the petitioner, first repaired to the office of Mr. Willison C. Prentiss and discussed with him the business upon which they had come to Washington, as aforesaid, the final result of which was that Mr. Prentiss and Mr. J. Harry Covington were employed to forward the efforts of the petitioner company to bring this controversy to the attention of the Land Department of the United States and to impress upon it, if possible, that the decision of the Circuit Court of Appeals was erroneous; that it would embarrass the Department in its future disposition of the mineral lands of the United States, and that it would be proper and to the interests of the public for the Department to intervene through the Department of Justice to procure a review by this honorable tribunal of

said rulings of the honorable Circuit Court of Appeals of the United States for the Eighth Circuit. Affiant further says that no arrangement was made by this affiant and Mr. Prentiss with respect to the particular steps or proceedings which should be taken by him to accomplish the objects contemplated as aforesaid; that affiant is not a counselor at law or learned or experienced in law, and that the paramount thought in the mind of this affiant was that if it were true, as the solicitors of petitioner had assured this affiant and petitioner's board of directors, that the decision of the Court of Appeals for the Eighth Circuit in this cause was clearly erroneous and was contrary to the practice of the Land Department of the Government and would prove an embarrassment to the Land Department in the future disposition of mineral lands of the United States, the matter ought to be brought cogently to the attention of the proper public officials, and affiant felt confident that if it should be done that it would be their duty to seek to have said decision reviewed by this honorable court and that they would seek to have it reviewed accordingly. And affiant further says that it is not true that there was ever any understanding or expectation upon his part or upon the part of petitioner that Mr. Prentiss should appear in the cause in this honorable court as *amicus curiae*, and affiant says that he had never, prior to reading the motion and brief in support thereof filed by counsel for respondent in the pending proceeding, given any consideration whatever to the status or duties of a counselor denominated "*amicus curiae*" or ever knew of the appearance of a counselor at law in any court in any such capacity.

This affiant further says that he does not wish to be understood as deposing that he did not expect Mr. Prentiss to appear in this cause in this honorable court, but affiant does say that he had not at the time of his visit to Washington with Mr. Ellis, or during his visit here, or thereafter, prior to Mr. Prentiss' appearance in the case, considered at all

what work or labor should be done with respect to forwarding the interests of petitioner in the matter then pending, but assumed, as a matter of course, that Mr. Prentiss would do whatever was usual and necessary to be done.

And this affiant further says that it never occurred to him that any advantage was to be gained or could be gained by the petitioner over the respondent by Mr. Prentiss' appearance in this court at a late day as *amicus curiae* or by the tardy filing of a brief. Affiant further says that it was left entirely to the various counsel and solicitors employed in this cause to take their own course to procure the issuance of the writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, and that petitioner never did at any time consult with Mr. Prentiss or Mr. Ellis or any other of its solicitors with respect to the advantage or disadvantage or otherwise of the appearance of counsel in the cause as *amicus curiae*. Affiant further says that he has read the respondent's motion to vacate the order allowing writ of certiorari and brief in support of same filed in the pending proceeding, and referring to the averments on page 8 of the said document, this affiant denies that pursuant to said employment and in order to secure "a review of the case of Silver King Coalition Mines Company vs. Conkling Mining Company" in this court it was then or there or at any time in the case agreed or arranged by this affiant and the said Prentiss that the said Prentiss, instead of appearing openly upon the record as counsel for petitioner, and as such, presenting an argument as its retained counsel, should pose in this litigation only as a friend of the court, and as not employed by or representing either party to the cause, and that as *amicus curiae* he should represent to the court that the questions involved in the litigation were of great and general interest and concern and that a review by this honorable court of the ruling of the Circuit Court of Appeals is essential to the quieting of titles disturbed by said rulings and to the settling of the law upon questions decided by the said

Circuit Court of Appeals, and that taking advantage of permission obtained by him in the capacity assumed he should present to this court a brief in such manner and under such circumstances as that the solicitors for respondent would have no opportunity either to make reply or to question his right to appear, and this affiant denies that in furtherance of said alleged design or otherwise or for the purpose of concealing from this court or opposing counsel the true relations borne by said Prentiss to this litigation, this affiant or petitioner concealed from the respondent or its solicitors the employment of said Prentiss or the fact that any conference whatever was had with him, and the affiant denies that he caused the said notice of motion referred to by respondents to be served by the amicus curiæ, or the application to be made to this court or caused notice of said motion to be so worded as to appear to be addressed to and served upon both counsel for the petitioner, Silver King Coalition Mines Company, and counsel for the respondent, and denies that said Prentiss or the said counsel of record of petitioner was so acting as aforesaid by any secret or other agreement in the employ of the petitioner, Silver King Coalition Mines Company, and denies that petitioner or this affiant caused the motion referred to to be worded as set forth and quoted on page 9 of respondent's motion and brief herein. And this affiant further says that Mr. E. B. Critchlow, the chief active solicitor for the respondent company, was for a number of years a stockholder in the Silver King Coalition Mines Company, and upon information and belief affiant avers that the said Critchlow was in August, September, and October, 1919, and still is, a stockholder in the petitioner company; and affiant further says that he is informed by the solicitors of the petitioner company that there is and has been for many years a statute of the State of Utah which allows any stockholder, upon demand directed to the secretary, to examine the books and accounts of any corporation doing business in that State, and that the retainer paid Mr. Prentiss in the premises was

forthwith entered upon the books of account of the petitioner company upon the return of affiant to Salt Lake City in the first week of September, 1919, to which counsel for respondent has at all times had access by virtue of said statute.

And this affiant further says that he was the only person to whom authority was delegated by the petitioner company to secure additional counsel and legal services in the matter of the application of petitioner for the writ of certiorari, and all that has been done upon behalf of petitioner in that regard has been done by this affiant except such services as have been rendered in the matter by petitioner's solicitors. And this affiant says that he acted with reference to the employment of Mr. Prentiss and Mr. Covington in good faith and without any intention in any manner to deceive this honorable court or to procure any advantage over the respondent, or to subject it, or its counsel, to any embarrassment, or to deprive them in any manner of any right to make any objection or to secure any hearing in this cause which the law allows them, and affiant says that he is informed by his solicitors and believes, and therefore avers, that notwithstanding the fact that the brief of Mr. Prentiss as *amicus curiæ* was not received by the solicitors for the respondent before October 4, 1919, and that the application for the writ was presented on October 6, 1919, that the solicitors for the respondent were not thereby deprived of the opportunity to object to the appearance of Mr. Prentiss in the cause as *amicus curiæ* nor of ample opportunity to file an answer to his brief, for that this affiant is informed and therefore avers that leave to file a brief in answer to the brief of the *amicus curiæ* would undoubtedly have been granted by this honorable court if leave had been requested, and that the record shows and that it is admitted in the respondent's pending motion just filed in this court by Mr. E. B. Critchlow, that the brief of the *amicus curiæ* was received and examined by him on October 6th, and that the decision of this court granting the said writ was not announced until October 20, 1919, and that therefore

the counsel for respondent had full two weeks' time within which to make application for leave to file an answer to the brief of the *amicus curiae*.

Affiant further says that he has read in the respondent's brief herein the reference therein made to the case entitled "Silver King Consolidated Mining Company *vs.* Silver King Coalition Mines Company," and upon that subject this affiant says that he was not at the time the ore was taken from the Vesuvius claim (which was the ore in controversy in the case entitled Silver King Consolidated Mining Company *vs.* Silver King Coalition Mines Company), a member of the board of directors of management or in anywise an agent or representative of the said Silver King Mining Company or of its successor the present petitioner and had no knowledge of and in no manner participated in the extraction of said ore and was in nowise responsible for the same or for the failure of the Silver King Mining Company to keep an account thereof for the benefit of its co-tenant.

Affiant further says that Mr. A. C. Ellis, Jr., one of the solicitors for petitioner, was taken ill in Salt Lake City in February, 1920, and has since been absent in California on account of the state of his health, and that it has been impossible to procure an affidavit from him for use in this hearing, because of the brief time intervening between the service of the papers in this case and the date of the hearing, and because Mr. Ellis left San Francisco, as this affiant is informed by a clerk in his office in Salt Lake City, on the 21st inst., intending to motor to Salt Lake City, where he had not arrived when affiant left Salt Lake City on the 23d inst. and a telegram sent to Mr. Ellis on the 22d inst. at San Francisco could not be delivered because of his departure as aforesaid.

Further affiant saith not.

W. MONT FERRY.

Subscribed and sworn to before me this 28th day of May, 1920.

HARRY J. DONOHUE,
Notary Public.

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Affidavit of William C. Prentiss.

DISTRICT OF COLUMBIA, ss:

William C. Prentiss, being duly sworn, deposes and says that he is an attorney practising in the city of Washington, District of Columbia, and is the William C. Prentiss referred to in the motion filed by the respondents in the case of Silver King Coalition Mines Company *vs.* Conkling Mines Company, No. 489, October Term, 1919, in the Supreme Court of the United States; that sometime in August, 1919, Mr. A. C. Ellis, Jr., one of the attorneys for the petitioner in said case, and Mr. W. Mont Ferry called upon the affiant and conferred with him regarding the said case, and Mr. Ellis stated that it was one in which the Government of the United States should be interested and that he thought if the matter were properly explained to the Interior Department and the Department of Justice the Government would join in the application for certiorari; that the affiant examined the case and suggested that Honorable J. Harry Covington, an attorney practising in the city of Washington, be employed to present the matter to those departments, and that the affiant would assist him; that Judge Ellis thereupon retained Judge Covington and the affiant for the purpose, as stated, of presenting the matter to the Interior Department and the Department of Justice; that the affiant, after he had looked into the case, suggested to Judge Ellis that the questions of boundaries of a patented mining claim and extralateral rights were of very great importance to the mining world generally and to clients of the affiant, in particular to the United States Mining Company, for whom the affiant was counsel in a controversy with one Wall before the Interior Department involving the question of boundaries of a patented mining claim, in which controversy the decision of the Circuit Court of Appeals in this Silver King Coalition

Mines Company *vs.* Conkling Mining Company case had been cited against the affiant; that the said case before the Interior Department was pending before the secretary and that it would be of great advantage to the United States Mining Company if the supreme court would review the said decision of the Circuit Court of Appeals, and the affiant suggested to Judge Ellis that under the circumstances he, the affiant, felt warranted in asking the Supreme Court of the United States to permit him to file a brief as *amicus curiæ* in the matter of the application for certiorari in the said case of the Silver King Coalition Mines Company *vs.* Conkling Mining Company, and Judge Ellis suggested that if the affiant would do so the Silver King Coalition Mines Company would pay the bill for printing the brief; that the affiant had the brief printed in Washington, D. C., and the Silver King Coalition Mines Company reimbursed him the cost thereof; that the matter of submitting brief as *amicus curiæ* was discussed with Judge Ellis and not with Mr. Ferry, and that Mr. Ferry did not suggest to or request the affiant to prepare and submit a brief in the case as *amicus curiæ* nor, as a matter of fact, did Judge Ellis, but that the suggestion was voluntary on the part of the affiant; that the affiant thereupon investigated the matter of drafting and issuing patents in the General Land Office and developed the matters which he later presented in the brief as *amicus curiæ* submitted to the supreme court; that the affiant, pursuant to his employment by Judge Ellis, prepared a memorandum on the subject of the interest of the Government in the controversy for submission to the Department of Justice, and with Judge Covington appeared before the Assistant Secretary of the Interior and made oral argument upon the subject; that the Department of the Interior, being convinced that the public interests, and particularly the administration of that department, would be subserved by a review of the decision of the Circuit Court of Appeals, thereupon made a request to the attorney-general to intervene in the

matter of the application for certiorari, and pursuant thereto the solicitor-general prepared and submitted a memorandum requesting the court to grant the application; that neither Judge Covington nor the affiant prepared the said memorandum or had anything to do with the preparation thereof; that as a matter of accommodation to Judge Ellis and other counsel for the Silver King Coalition Mines Company the affiant in their behalf submitted the said application for certiorari and at the same time submitted his own motion for leave to file a brief as *amicus curiae*; that just before submitting the said motions Honorable William H. King, one of the attorneys for the Conkling Mining Company, was sitting just behind the affiant in the court-room and said to the affiant that he would like to know whom the affiant represented and that he suspected that affiant's client was the Silver King Coalition Mines Company, and that he was going to oppose the affiant's application for leave to file brief as *amicus curiae*; that Senator King, however, did not rise and make any objection, and after the affiant had submitted the applications he expressed to Senator King surprise that he had not done so, and Senator King stated that he was afraid that if he had done so he would have aroused the court's curiosity as to what was in affiant's brief and that the court would have been more anxious then to receive and consider the brief, or words to that effect; that after the application for certiorari had been submitted the record on appeal reached the clerk's office of the supreme court, and at the request of counsel for the Silver King Coalition Mines Company the affiant entered his appearance in that case for the purpose of docketing the appeal, and thereafter the affiant rendered legal services and advice to counsel for the Silver King Coalition Mines Company in the matter of the certification of the record in the certiorari case and regarding the printing of the records in the two cases; that the affiant for his services before the Interior Department, the Department of Justice, and the minor services in the matter

of the certiorari and appeal records received from the Silver King Coalition Mines Company a retainer and fee equal in amount to the retainer and fee received by Judge Covington, and made no additional charge and received no fee from said company for or in respect of the brief filed by him as *amicus curiae*; that the affiant has read the motion filed by the Conkling Mining Company, a copy of which was served by it upon the affiant, and has also read a copy of the brief accompanying the printed copies of the same, a copy of which brief was not served upon the affiant, and in particular has read what appears at pages 27 and 28 of the said printed copies, and the affiant avers that it was not agreed between the affiant and counsel for the Silver King Coalition Mines Company or Mr. Ferry, and there was no intent or purpose on the part of the affiant, that in his brief as *amicus curiae* it should be made to appear that he was not directly interested in the litigation or that in order to impose such a deception on the court a copy of the brief was to be served upon the petitioner's counsel as though strangers to the proceeding, but the affiant avers that he consulted with the office of the clerk of the supreme court as to the practice in submitting motions for leave to file briefs as *amicus curiae* and was advised that the proper course was to mail copies to counsel for both parties about a week before the time for submission of his motion and that copies were served upon counsel for both parties accordingly; and the affiant further avers that it was not arranged that information concerning the submission of said brief was to be withheld from the respondent until the last possible moment, but that so soon as the affiant could finish the preparation of the said brief and have it printed he promptly served copies by registered mail and a copy in person upon Senator King; that the affiant's recollection is that at the time he served copies by mail he called at Senator King's office, but Senator King was not in, and that he called again once or twice and finally asked Senator King's clerk or someone in his office to ac-

knowledge service for him and that there was no purpose of delaying the service of a copy upon Senator King; that the affiant made no representation calculated in any wise to deceive the court, but in his motion placed his application for leave to file the brief as *amicus curiae* upon the ground that the questions of boundaries of a patented mining claim and extra-lateral right on a cross-vein, which were involved in said cause, were of great and general interest and concern and that review by the supreme court of the rulings of the Circuit Court of Appeals was essential to the quieting of titles disturbed by such rulings and to the settling of the law as to extra-lateral right on a cross-vein, which the affiant believed and still believes and asserts to be the fact; that the affiant in his brief as *amicus curiae* did not designedly omit the letter of the commissioner of July 19, 1904, referred to in the printed copies of the motion of the Conkling Mining Company at page 32 *et seq.*, but avers the fact to be that the said letter did not come to his attention in the examination made by him at the General Land Office, but that even had it come to his attention he would not have regarded it as of any consequence or of sufficient importance to be incorporated in his brief; that on page 37 of the printed copies of the motion of the Conkling Mining Company the statement is made that the brief of Prentiss was also intended to mislead this court into believing that there were twenty thousand (20,000) patents issued under the law between 1891 and 1904 and that the titles held under these patents are disturbed by the ruling of the Circuit Court of Appeals and that whether or not his, the affiant's, unsworn statement as to the number of patents be true or otherwise, counsel for the Conkling Mining Company "have taken no pains to verify;" the affiant avers, however, that his statement as to the number of patents was verified by the Land Department and the same statement was made in the memorandum filed by the solicitor-general, and with respect to the assertion that counsel for the Conkling Mining Company had taken no

pains to verify the statement, the affiant avers that he has been informed by Miss Bertha W. Jones, clerk in charge of the writing of mineral patents in the General Land Office, that Mr. Critchlow, one of the counsel for the Conkling Mining Company, and who, the affiant is informed, wrote the brief containing the said statement that counsel for that company had taken no pains to verify the affiant's statement, spent days at the General Land Office and examined volume after volume of recorded patents soon after the affiant made his investigation at the General Land Office; the affiant further says that this affidavit has been dictated by him for the purpose of fully disclosing the facts to the court and that the statements therein have been made by him of his own motion and not at the suggestion or dictation of any officer or attorney for the Silver King Coalition Mines Company.

And further the affiant saith not.

WILLIAM C. PRENTISS.

Subscribed and sworn to before me this 28th day of May, 1920.

DWIGHT K. TERRY,

Notary Public.

Argument in Opposition to the Motion of Respondent to Vacate the Order Allowing the Writ of Certiorari.

Considerable delay has occurred in getting together the entire record in this case in the Circuit Court of Appeals for the Eighth Circuit for transmission to this honorable court in pursuance of the writ of certiorari issued in October. Counsel for the respondent was unwilling to sign the usual stipulation filed with the clerk of the Circuit Court of Appeals and much time was spent in an effort to agree with counsel upon the parts of the record essential to be sent up

for a proper review of the case. When it was perceived that no progress to this end could be expected an order was filed with the clerk of the Circuit Court of Appeals requiring him to transmit to this court the entire record, including all the exhibits upon both proceedings in the Circuit Court of Appeals. The clerk of the Court of Appeals finally reported to counsel for petitioner that various exhibits had been returned to the District Court of the United States in and for the District of Utah, and the clerk of that court reported that a large number of the exhibits referred to had never been received by him. This necessitated the preparation of a large number of elaborate maps and of certified copies, from the General Land Office, of field notes and patents of various claims; whereupon petitioner sought to secure a stipulation from counsel for respondent to substitute these copies, the correctness of which was supported by affidavits and the usual certificates to official documents. After delay of several weeks in the examination of the exhibits the stipulation was refused. A motion was then made to substitute the copies for the originals, this motion being filed both in the District Court of the United States at Salt Lake City and in the Circuit Court of Appeals at St. Paul. The motions were resisted by our friends upon the other side, and, in the course of the proceedings at Salt Lake City, Mr. Ferry, who had made an affidavit to the effect that he had searched the petitioner's office in an effort to find, if possible, the exhibits alleged to be lost, was required to attend upon the court by counsel for respondent, and under the guise of examining Mr. Ferry with respect to his affidavit the testimony embraced in Exhibit "A" to our opponent's motion upon the pending proceeding was elicited by Mr. E. B. Critchlow.

The District Court concluded that the motion should be passed on by the Circuit Court of Appeals. On the day set for the hearing of the motion at St. Paul Mr. Critchlow did not appear and the motion was granted as of course. The clerk is now preparing the record for certification to this

court pursuant to the writ of certiorari and the same will be transmitted within the next two weeks. Deposit for printing the record on the appeal has been made with the clerk of this court and at the proper time a motion to dispense with the printing of the certiorari record will be submitted.

The substance of Mr. Ferry's testimony, so far as it is claimed to be applicable upon the present proceeding, we think, may fairly be stated in substance as follows:

By Mr. Critchlow: "Did you also visit a counsel with other attorneys for the Silver King Coalition Mines Company?" Answer—"Yes." Question—"Who were they, Mr. Ferry?" Answer—"There was Mr. Prentiss * * * and Judge Covington * * * Mr. Prentiss was employed by us * * * I could not give you the date * * * Soon after we reached there * * * " Question—"You had it (Mr. Prentiss' brief) printed? did you not?" Answer—"Oh, yes, I had it soon after I got back" (to Salt Lake City). I presume the Silver King Coalition Mines Company paid for the printing of Mr. Prentiss' brief. I paid him for his services. I have read Mr. Prentiss' brief (pages 13, 14 and 15, of Exhibit 'A' "). Mr. Ferry continued—"I do not recognize Exhibit 'XZ' as Mr. Prentiss' brief; but I assume that it is such * * * I did not employ him for the purpose of writing that brief * * * He was employed to give us counsel in respect to the purposes for which we were there,—to ascertain the necessary steps and seek advice respecting the possibility of having a Supreme Court review of this case. Mr. Covington was employed for the same purpose * * * The fees and expenses of these counsel I have named were paid by the company later * * * I did not myself go to see the Department of the Interior or any of its officers * * * I do not recall ever having seen before the little brief or 'suggestion' filed in the Supreme Court of the United States by Alexander C. King, Solicitor General, and printed at the Government Printing Office. I do not know who prepared

that brief. I do say that Mr. Prentiss and Mr. Covington were employed to use every effort possible to get a review of this case by the Supreme Court." Question by Mr. Critchlow: "Including an intervention, if possible, by the Interior Department, or some officer of the Department of Justice?" Answer—"Yes, sir." Question—"As a matter of fact, yourself and Mr. Ellis, in connection with Mr. Prentiss, agreed, did you not, that in every possible way information of the employment of Mr. Prentiss and of the proposed intervention by the Interior Department or the Department of Justice should be kept from the attorney or counsel of the Conkling Mining Company?" Answer—"No * * * (Exhibit 'A,' page 19) I was not in Washington at the time when the brief of Mr. Prentiss was filed nor when the 'suggestion' of the United States relative to the granting of the writ of certiorari was filed. I do not know when they were filed * * * My recollection is that Mr. Prentiss was employed in the latter part of August, 1919. He was introduced to me by Mr. Ellis and Mr. Prentiss introduced me to Mr. Covington. I do not know whether or not Mr. Covington wrote any brief in this case." Mr. Ferry further testified that both Mr. Covington and Mr. Prentiss were employed generally as attorneys for the petitioner company in connection with this case, to give their best attention to the matter, Mr. Ferry stating specifically that he did not specify any particular thing that either of them was to do. (Ex. A, p. 23.)

It has been said that law is anything which is boldly asserted and plausibly maintained, and it is evidently the opinion of our friends upon the other side that this may be said also of the facts of a case. On page 7 of our friends' motion it is boldly asserted that upon the occasion referred to in the foregoing testimony, it was agreed and arranged between said Ellis and Ferry and the said Prentiss that the said Prentiss, instead of appearing openly upon the record as counsel for

petitioner and as such presenting an argument, should pose in this litigation only as a friend of the court, and as not employed by or representing either party to the cause, and that as *amicus curie* he should represent to the court that the questions involved in the litigation were of great and general interest and concern and that a review by this court of the ruling of the Circuit Court of Appeals was essential to the quieting of titles disturbed by said rulings and to the settling of the law upon questions decided by the said Circuit Court of Appeals and that he, said Prentiss, should present to this court a brief in such manner and under such circumstances as that the solicitors for respondent would have no opportunity either to make reply or to question his right to appear; and that in furtherance of said design, and for the purpose of better concealing from the court and opposing counsel the true relations borne by said Prentiss to this litigation, they concealed from the respondent and its solicitors the employment of said Prentiss and the fact that any conference whatever was had with him, and caused the said notice of motion [set forth on page 9 of the motion] to be served upon the eve of the application to be made to this court, and caused the notice of said motion to be so worded as to appear to be addressed to and served upon both counsel for the petitioner and for the respondent, notwithstanding the fact that said Prentiss and the said counsel of record of petitioner were so acting, as aforesaid, by secret agreement in the employ of the petitioner.

The evidence bearing upon these bold charges is that contained in the said Exhibit "A" and the questions and answers most pertinent to the allegations which we have just quoted are the following, found on page 19 of our opponent's brief: Question—"As a matter of fact, yourself and Mr. Ellis, in connection with Mr. Prentiss, agreed, did you not, that in every possible way information of the employment of Mr. Prentiss and of the proposed intervention by the Interior Department or the Department of Justice should be kept

from the attorney or counsel for the Conkling Mining Company?" Answer—"No."

There is not a line or syllable of testimony given by Mr. Ferry upon the occasion in question which reflects in any manner upon the good faith or honesty of his conduct in representing the petitioner in employing counsel upon the occasion of his visit to Washington in August, 1919, and, yet, upon the testimony contained in Exhibit "A," it is asserted by counsel upon the other side that a conspiracy was entered into between Mr. Prentiss, Mr. A. C. Ellis, Jr., and Mr. Ferry, whereby Mr. Prentiss should appear in this honorable court and conceal the fact that he had received a fee from the petitioner and procure leave to file a brief as *amicus curie* with the intention of deceiving this honorable court and gaining some undue advantage over the respondent.

It is inconceivable that our friends upon the other side ever desired to file any brief in opposition to the brief filed by the *amicus curie* in this cause. It is admitted in Mr. Critchlow's brief filed in this honorable court in this proceeding that he received in his office in Salt Lake City a copy of Mr. Prentiss' brief on October 6, 1919. Full two weeks elapsed after that day before the decision of this honorable court upon petitioner's application for the writ was announced; and during all this period of time the brief of the *amicus curie* was admittedly in the possession of the active solicitor for the respondent, Mr. Critchlow, and he gave no sign of any desire to be heard in opposition to anything stated in the brief or to be afforded time to make any further investigation in view of the contents of said brief.

On page 31 of the brief of our friends upon the other side, it is stated that the *petitioner's* conduct was "*expressly designed to result*," and did result, in prejudicing the respondent and in depriving it of the rights granted and guaranteed to it by the customs, rules, and practices of this court. But this is a purely gratuitous assertion. The sum and sub-

stance of the petitioner's conduct, speaking of its conduct as distinguished from the conduct of its solicitors, is the conduct of Mr. Ferry, and all that relates to his conduct is disclosed in Exhibit "A," subjoined to respondent's brief on pages 13 and 23, and we most respectfully submit that there is nothing disclosed by the testimony contained in said exhibit that justifies counsel upon the other side in attributing to Mr. Ferry or his principal any sinister or improper purpose whatsoever in seeking the aid and assistance of counsel to procure the writ of certiorari in this case, or in respect to their conduct in presenting the matter to this court. Something is sought to be gained by our friends upon the other side by the use of the expression that "they were employed to use every effort possible to get a review of this case by the Supreme Court of the United States." This language is italicized and quoted upon page 32 of our friends' brief as if it had some sinister import.

The Fraud upon the Court.

Under this heading, on page 38 of the brief, our friends upon the other side insist that a fraud was worked upon the court because Mr. Prentiss was employed by Mr. Ferry as counsel to aid in securing the writ of certiorari and that he appeared in this case as *amicus curiæ* without disclosing such employment. We have subjoined the affidavit of Mr. Prentiss from which it very conclusively appears that he was perfectly innocent of any intention to impose upon this honorable court or to practice any kind of concealment or chicanery. It is shown that he appeared ostensibly as the friend of the court, and actually as the friend of the court, and that the brief which he filed in this case as *amicus curiæ* was not filed in fact as attorney or solicitor for the petitioner, and that he never has made and does not expect to make any charge against the petitioner for the preparation or filing of that brief; and that he regarded his employment by the pe-

tioner as being particularly for the purpose of inducing the Government of the United States to interest itself in the application for the writ of certiorari. Mr. Prentiss points out in his affidavit that it was never suggested by Mr. Ferry that he should appear in the case as *amicus curiæ* or by Mr. Ellis, but that he (Mr. Prentiss) himself suggested such an appearance in view of the fact of his having clients whose interests were involved in the questions presented upon petitioner's application for the writ. The testimony of Mr. Ferry as given upon the hearing in Salt Lake City and embodied in Exhibit "A," affords not the least justification for the charge that petitioner or Mr. Prentiss were consciously guilty of any impropriety in the matters complained of by the respondent.

Although our friends upon the other side boldly aver that where a counsellor has received a fee from a litigant, and appears in the cause as *amicus curiæ*, it is so clearly a fraud and imposition on the court that no argument or citation of authority is necessary to prove it, our minds do not yield a ready assent to this proposition. Ordinarily an *amicus curiæ* appears to present his views upon some question of law involved in a proceeding before the court, and it seldom, if ever, happens that the *amicus curiæ* has no interest to procure a decision of the question in accordance with his contentions. The fact is generally otherwise, and this court has held that where it does not appear that one seeking to file a brief as *amicus curiæ* is interested in some other case which will be affected by the decision of the court, this is good ground for refusing leave to file an argument as *amicus curiæ*. *Northern Securities Company vs. U. S.*, 191 U. S., 555.

We do not believe that in any case the argument of any counsel in this court, upon any question presented to it, proves more convincing to the court when he appears as *amicus curiæ* than when he appears as counsel for a party of record. We believe that this court, like other courts, considers an argument upon its merits and upon its merits yields or refuses to yield assent to it, and that its assent to a propo-

sition is not gained by the personality of counsel or the capacity in which he speaks, but only by the authorities which he cites and the reasons which he gives for the conclusions for which he contends.

If this honorable court had had before it upon the merits of the questions involved in petitioner's application for the writ of certiorari in this cause nothing more than the brief filed by Mr. Prentiss as *amicus curiæ*, we feel convinced that its judgment would have been moved to the granting of the writ solely by the merits of the arguments advanced in his brief, and that the action of this court would have been in no wise influenced because it had not been disclosed that Mr. Prentiss had received a fee from the petitioner company to assist their counsel in inducing the Government of the United States to intervene in this cause. If, therefore, we may assume that this honorable court has decided upon the record, and upon the brief filed August 7, 1919, by Mr. W. H. Dickson, Mr. A. C. Ellis, Jr., and others, in behalf of petitioner, and upon the memorandum of the Solicitor General of the United States, and upon the brief of Mr. Prentiss, after giving full consideration to the contentions of the gentlemen upon the other side in opposition, as contained in their brief filed September 26, 1919, then how can it be said that the so-called "fraud" operated or contributed in any wise to the granting of the writ of certiorari herein? And how is respondent injured by the fact that the court was ignorant that Mr. Prentiss had received a fee from the petitioner for the services stated in his affidavit? Counsel say they were injured because they did not have opportunity to file a reply to the brief of the *amicus curiæ*; but this is not a sufficient answer because it is not according to the fact. They had ample time to procure leave to file reply, and it is inconceivable that an application for that purpose would have been refused.

Seven months have elapsed since the filing of the brief of the *amicus curiæ* in this cause, and counsel are not at a loss

for an *opportunity*, even at this late day, to answer the arguments they complain of, and they take issue with the *amicus curiæ* and with the Solicitor General of the United States with respect to the number of patents which have been issued by the Government of the United States in language similar to that contained in the Conkling patent involved in this cause, attacking the *amicus curiæ* for having omitted from his brief a letter of Commissioner Richards under date of July 19, 1904, and a reference to section 2327, Revised Statutes of the United States, and complaining that the statement of Mr. Prentiss, that the evidence of the Silver King Coalition Mines Company as to the true boundaries of the Conkling claim was practically undisputed.

The inference our friends upon the other side would have this court draw is, that if they could have had an opportunity to say promptly what they *now* say in opposition to the views and statements of the *amicus curiæ*, the writ of certiorari issued in this cause, not alone at the instance of the *amicus curiæ*, but at the instance of petitioner and of the Government of the United States as well, would never have been granted. The answer to all this is, that if our friends upon the other side have now completely abolished all reasons why the writ should have been granted and abolished such reasons by arguments in support of the correctness of the decision of the Circuit Court of Appeals, then they have not been injured by the granting of the writ, for if the decision of the Court of Appeals is correct it will as a matter of course be finally affirmed by this honorable court. If our friends upon the other side contend that it is not their position that the order granting the writ should now be annulled because upon the merits the decision of the Court of Appeals is correct, but because the question involved is not of general interest or of interest to the Government of the United States and that it must be presumed that the writ of certiorari was awarded by this court because the questions involved were of such a character, our answer is that our

friends upon the other side have had their day in court upon this question as fully appears by their brief filed September 26, 1919, and that the decision of this court, if we are to assume that the writ was issued because of the character of the questions involved, was not predicated upon the statements of the *amicus curiæ* alone, but must have been predicated in part upon the statement of the Solicitor General of the United States, that the main question involved in the application for the writ is one of great interest and importance to the Government of the United States. Indeed, the questions involved, as pointed out in the petitioner's brief of August 7, 1919, are indisputably of general public interest, and of great importance and interest to the Government of the United States, *res ipso loquitur*. It is true that in the brief of the *amicus curiæ* it is stated that there are approximately twenty thousand patents affected by the decision of the Court of Appeals; this statement is corroborated in the memorandum or suggestion filed upon behalf of the Government of the United States. Our friends upon the other side say they have taken no pains to verify this statement of the *amicus curiæ*. Have they taken the pains to verify the statement of the Solicitor General of the United States to the same effect? Presumably they have not. But the truth of this statement by the *amicus curiæ* and by the Solicitor General of the United States can be readily tested by an examination of the archives of the Government, in the very city in which this honorable court is held.

Our friends upon the other side are bold enough to assert, that Mr. Prentiss designedly omitted to call to the attention of this honorable court the letter of Commissioner Richards set forth upon pages 33 *et seq.* of our friends' brief. Mr. Prentiss has categorically answered in his affidavit this groundless accusation. The letter refers to the practice which had formerly prevailed in the Land Department in making what were known as segregation agreements showing surveyed mining claims in townships, the practice hav-

ing been to locate each claim by its tie-line irrespective of whether or not there may have been error in such lines, and suggesting that the practice in that respect would have to be revised in order to conform to the so-called Brooks Act of April 28, 1904, and to the rule which had always prevailed that the land actually surveyed and marked on the ground was the actual area embraced in a surveyed mining claim notwithstanding error in tie-line.

Counsel for respondent say on page 35 of the brief that "petitioner"—from the language appearing on page 30 of the brief of the *amicus curiæ*—would have the court believe that the original positions of the monuments of the Conkling claim were conclusively established by practically uncontroverted evidence. Our friends upon the other side say "such is not the fact." We have heretofore fully discussed this question in the brief filed herein on August 7, 1919 (see pages 11 to 35 and 70 to 89).

Our friends upon the other side, continuing in their curiously inconsistent fashion to insist that this is not the occasion for a discussion of the merits, attack the *amicus curiæ* for failing to call attention to the fact that "*it is claimed by respondent to be a common happening in the mountainous country * * * for posts to be obliterated by snows and other means and * * * for mineral surveyors to re-establish such posts in places where they thought they ought to be.*" We do not conceive that it is necessary to discuss the merits of this case upon this motion and hesitate to trespass upon the time of the court in doing so, but feel it our duty to meet the arguments of our adversary, however inopportune the occasion upon which they may be advanced. Our friends upon the other side say that the *amicus curiæ* should have called attention to the field-notes of the Show-Me lode in which Mr. C. P. Brooks recites that in the survey of this claim he had re-established for prior claims four such lost posts in the position where he thought they ought to

stand. It is not at all surprising that the *amicus curiae* failed to call attention to such a record. Counsel here is throwing out, with a vague longing of affecting the imagination of this honorable court, a suggestion that perhaps *somebody*, of whom we have never heard, at some time which has never been suggested, re-established the westerly corners of the Conkling claim in the positions "where he thought they ought to stand." This is pure conjecture without a scintilla of evidence in its support and at war with all the evidence in the case.

The temerity of our friends almost passes comprehension. See how boldly they enter upon the attack upon the *amicus curiae*. They say (page 37 of their brief) "The brief of Prentiss was intended to mislead the court into believing that there are twenty thousand (20,000) patents issued under the law between 1891 and 1904, and that the titles held under these are disturbed by the ruling of the Circuit Court of Appeals." What justification is there for the statement that Mr. Prentiss intended to mislead this court in the manner stated? As we understand it Mr. Prentiss's position is that there are approximately twenty thousand (20,000) patents issued between the dates stated, and that in the case of each of these patents, if the ruling of the Circuit Court of Appeals shall stand, the land conveyed will be determined by the calls in the patents irrespective of the monuments upon the ground notwithstanding frequent errors, as is well known, have occurred in calculating distances. The *amicus curiae* avers that the titles claimed under these patents have, therefore, been disturbed by the ruling of the Court of Appeals—disturbed, of course, upon the assumption that the monuments upon the ground do in law control the calls in the patent. Counsel of course insist that the ruling of the Court of Appeals does not disturb the titles claimed under these patents, because—because of what? Because, as they contend, the law is that the calls of the patent control as

against the monuments upon the ground. But this is merely begging the question.

The Relief Sought by Respondent.

Respondent contends that it is entitled to an order *vacating the order of October 20, 1919, allowing the writ of certiorari*. In support of this unreasonable and unprecedented demand, it is pointed out that a delay of more than seven months has been suffered. But, if Mr. Prentiss had been employed by the petitioner to file a supplemental brief in this cause as one of its solicitors, or if it had been stated to the court by Mr. Prentiss that he had received a fee from the petitioner, this same delay of which complaint is made must still have been suffered by the respondent, unless we assume that if Mr. Prentiss' brief had been filed by him as a solicitor for the petitioner, or he had disclosed to the court that he had received, as stated in his affidavit, a fee from the petitioner, this court would have refused to grant the writ of certiorari, notwithstanding its issuance was requested by the Government of the United States through its solicitor-general on account of the public nature of the questions involved in the controversy. But common sense forbids us to entertain such an hypothesis.

Our friends cite the opinion of Judge Sessions in *Weegham vs. Hillifer*, 215 Fed., 168, and Judge Sanborn in *Michigan Pipe Co vs. Vermont Ditch Co.*, 11 Fed., 284, at page 287, and of Justice Brewer in *Deucece vs. Reinhard*, 165 U. S., 336, and seek to make the language in these cases applicable to the conduct of the petitioner. It is only necessary to say, as we have already stated, perhaps sufficiently, that the alleged conduct of the petitioner is the conduct of Mr. Ferry in the employment of counsel in Washington in August, 1919, as detailed by Mr. Ferry in the evidence contained in Exhibit "A." We think we may submit that evidence to the court in complete confidence that it dis-

closes nothing which justifies any charge of bad faith, trickery, deception, fraud, injustice or unfairness [the words of Judge Sessions], or unclean hands or iniquity [the language of Judge Sanborn], or the charge that petitioner's conduct was offensive to the dictates of natural justice [the language of Justice Brewer].

These eminent judges, in the quotations extracted from the opinions cited, were all referring to the conduct of a party seeking relief in a court of equity in the very transaction, to use the language of Judge Sanborn, "which forms the basis of his suit." The language, if we may be pardoned for appearing to be dogmatic, is utterly inapplicable to the situation presented in the pending matter.

It may well be that if a litigant deliberately misrepresents to the court the truth in regard to some matter, which it is essential for him to establish in order to secure action by the court in his favor, and it is later made to appear that except for such misrepresentation, the action of the court would not have been taken. The court upon discovering the duplicity of the litigant, and the fraud and falsehood practiced upon it, would be justified in revoking its action. Why? Because of the fraud? No; not so much because of the culpability of the litigant as because the action of the court proceeded upon a mistaken view of the facts, and its action in favor of the litigant had not in fact any valid ground to rest upon.

• Tyrrell *vs.* D. C., 243 U. S., 1.

In a vague way counsel upon the other side seem to imagine that there is here presented such a case as is above supposed, but the facts of this case and the case supposed are as far apart as the poles. What fact did this honorable court suppose to exist, when it issued the writ of certiorari in this case, which, it is now shown, does not exist? Counsel will answer—they must answer—that the court was not aware of the fact that Mr. Prentiss had received a fee

from the petitioner. *But the issuance of the writ did not depend upon that question.* It depended upon the soundness of the averments under the title "*The grounds justifying the issuance of the writ*" on pages 29 to 35 (eleven paragraphs) in the petition for the writ of certiorari filed in this honorable court August 7, 1919, supplemented by the "memorandum" of the Solicitor-General of the United States, and the Government's request, through him, for the granting of the writ; supplemented, it may be, by the facts and arguments of the *amicus curiae* showing the undoubted importance of the questions involved, not only to the Government of the United States, but to the owners of mining claims patented in a period exceeding thirteen years prior to 1904. These are the considerations, we are constrained to believe, which induced the court to issue the writ in this cause; and it is not now shown, and it cannot be shown, now, or at any time, that these considerations do not as matter of fact exist, and that, therefore, the writ ought not to have been issued.

Character as a Defense.

The above is the final sub-heading in our adversaries' argument. It is difficult indeed to reply to it in restrained language. It is perfectly clear that the conduct of the former management of petitioner company, as disclosed by the evidence in the Silver King Coalition Mines Company of Nevada *vs.* Silver King Consolidated Mines Company, 204 Fed., 176-179, is wholly irrelevant to the inquiry now before this honorable court. It is not contended that any person who was in anywise responsible for the taking of the ore by the old Silver King Company, or your petitioner, and which was in controversy in the case in 204 Federal, had any, the remotest, connection with seeking or procuring the writ of certiorari issued in the case at bar. We have not conceived the corporate character of the petitioner was in controversy in this cause. Indeed, there seems something quite fantastical

about the discussion of the moral character of a corporation. We do insist, however, that, in the words of our friends upon the other side, it is "improbable" that any of the gentlemen connected in an official or representative capacity with the Silver King Coalition Mines Company "would knowingly countenance or in any way participate in or suffer an attempt to impose on the Supreme Court of the United States" in the manner suggested by our opponents, or in any manner whatsoever."

We fail to see the relevancy of the quotation from the court of appeals cited on page 43 of our opponent's brief, in which petitioner has been stigmatized as a defaulting trustee, but if this language has any relevancy then the following language of the court of appeals "in this very case" ought also to be considered, namely, "But the great bulk of the ore came from the one hundred and thirty-five foot strip. The King Company claimed the exclusive ownership of that strip, and its officers testified that they believed that the claim was well founded. In view of the fact that the district court sustained that claim, that the nature of the controversy was such that the King Company and its officers cannot be held to have been without probable cause to believe that its claim might be sound until it was otherwise adjudged by this court * * *" (225 Fed., at page 749). The question whether the petitioner was a reckless and defaulting trustee or acted in good faith is one of the questions discussed in the brief filed upon the merits in this cause and requires no further discussion at this time.

We respectfully submit that the motion of the respondent should be denied.

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A. C. ELLIS, JR.,
CURTIS H. LINDLEY,
R. G. LUCAS,
THOS. MARIGNEAUX,
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IN THE
Supreme Court of the United States

THE SILVER KING COALITION
MINES,

Petitioner,

vs.

CONKLING MINING COMPANY,

Respondent.

No. 128

Additional Argument on Question of Boundaries of
Conkling Claim Lot 689.

W. H. DICKSON,

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IN THE
Supreme Court of the United States

THE SILVER KING COALITION
MINES,

Petitioner,

VS.

CONKLING MINING COMPANY,

Respondent.

No. 158

**Additional Argument on Question of Boundaries of
Conkling Claim Lot 689.**

This is a suit in equity prosecuted by the respondent, the owner of an undivided three-fourths interest in the Conkling Mining Claim, to obtain an accounting from the petitioner, the owner of the remaining one-fourth interest, for ores alleged to have been extracted from the Conkling Mining Claim by petitioner.

Hereafter in this argument we will, for convenience, refer to respondent as the Conkling Company and to the petitioner as the Silver King Company.

The Silver King Company relied upon two defenses. First, that the Conkling claim as officially surveyed and monumented was but 1364½ feet in length, notwithstanding the patent describing the claim by courses and dis-

tances, disregarding the posts at the west end, as fifteen hundred feet in length, or 135.5 feet greater in length than was the claim as officially monumented; that substantially all of the ore in controversy mined or extracted by the Silver King Company was taken from beneath the surface of this 135.5 foot strip; that this strip belonged to the Silver King Company, the same having been patented by the Government to the Belmont Mining Company, and subsequently and before the extraction of the ores, conveyed by the Belmont Mining Company to the Silver King Company.

Second: That the Silver King Company was the owner of the following mining claims, namely: The "Constitution," the "Cumberland" and the "Monroe Doctrine;" that each of these claims was two hundred feet in width by fifteen hundred feet in length, and was situate somewhat northwesterly of the Conkling claim; that the only discovered or known vein or lode in these claims was the "Crescent Fissure" vein, which vein at its apex, and on its course crossed the located side lines of each of these three claims so that the *located* side lines of the claims became and were the *legal* end lines thereof; that this vein in its downward course dipped in a southeasterly direction, crossing the *located* end lines, the *legal* side lines of said claims to and beneath all of said one hundred and thirty-five and a half feet strip; that all of the ores beneath the said strip lay in and belonged to the said "Crescent Fissure" vein, and was the property of the Silver King Company.

It will be observed that neither of these defenses

conflicts with or is in any way inconsistent with the other, and that either of them, if established, constituted a complete defense to the suit prosecuted by the Conkling Company.

By stipulation of the parties, the question whether or not the Conkling Company was the owner of any of the ores found beneath the surface of this 135.5 feet strip, was first tried, the evidence being taken in open court.

The trial court, the Honorable John A. Marshall, Judge, presiding, found and determined both of these defenses in favor of the Silver King Company, and entered a decree dismissing the plaintiff's Bill of Complaint.

From the decree of dismissal the Conkling Company prosecuted an appeal to the Circuit Court of Appeals of the Eighth Circuit, before which court the case was argued and submitted, and about two and a half years thereafter a decision was rendered by that court reversing the decree—holding that the Conkling claim was fifteen hundred feet in length, and embraced the whole of the 135.5 feet strip, that the Silver King Company had no right under the law to pursue the said "Crescent Fissure" vein beyond the located end lines of the "Constitution," "Cumberland" and "Monroe Doctrine" claims, and remanded the case for an accounting.

Subsequently an accounting was had in the trial court, which resulted in a judgment or decree in favor of the Conkling Company, of \$542,222.58.

From this decree both parties prosecuted an appeal to the Circuit Court of Appeals, which latter court increased the judgment to \$570,076.50.

The entire case is now before this Court on writ of certiorari.

We will confine ourselves in this argument to a discussion of the question of the title, that is to say, the question whether or not the Conkling patent, truly interpreted, embraced any part or portion of the 135.5 foot strip. The question whether or not the Silver King Company had a right to pursue the "Crescent Fissure" vein beyond the *located* end lines of the "Constitution," the "Cumberland" and the "Monroe Doctrine" to and beneath the surface of that strip is covered in our brief at pages 89 to 121, and we add nothing to what is there said.

First, we take up the patent to the Conkling Company. Did that patent, properly interpreted, embrace any part or portion of the 135.5 foot strip? This patent, which is in the record as Exhibit 1, after referring to the field notes of the official survey upon which the patent was based and to the official lot number designated by the Surveyor General as Lot No. 689, describes the claim as follows:

"Beginning at corner No. 1, a pine post four inches square marked U. S. 689 P. 1; thence first course north 21° 9' west three hundred feet to discovery point; six hundred feet to corner No. 2, being also corner No. 4, of Lot No. 191, the "Lincoln Lode Claim," and corner No. 2 of Lot No. 580, the "Pirate King" Lode Claim, from which the U. S. Mineral Monument No. 4 bears north 32° and 52' west nine hundred thirty-nine and three-tenths feet distant, and a pine tree four inches in diameter marked U.

S. 689 P. 2 B T. bears north thirteen degrees west twenty-eight feet distant; thence second course south 60° and 45' west one thousand five hundred feet to corner No. 3; thence third course south 21° and 9' east six hundred feet to corner No. 4; thence fourth course north 60° and 45' east one thousand five hundred feet to corner No. 1, the place of beginning; said Lot No. 689 extending one thousand five hundred feet in length along said Conkling vein or lode, and containing twenty acres and forty-five one-hundredths of an acre of land, more or less."

Then the patent proceeds as follows:

"Now, know ye, that there is therefore hereby granted by the United States unto the said Boss Mining Company," etc., the said mining premises hereinbefore described * * * and all that portion of the said Conkling vein, lode or ledge, and of all other veins, lodes and ledges throughout their entire depth, the tops or apexes of which lie inside of the surface boundary lines of said granted premises *in said Lot No. 689* extended downward vertically, although said veins, lodes or ledges in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said premises; Provided, that the right of possession to such outside parts of said veins, lodes or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of *said Lot No. 689* so continued," etc.

Now, the Circuit Court of Appeals held that notwithstanding the patent expressly referred to the field notes of the survey and to the official lot number given by the

Surveyor General, yet since the description by courses and distances of the premises contained in the patent are free from ambiguity and since the description did not mention or refer to any posts or monuments either at corner No. 3 or corner No. 4, the field notes which in compliance with the Act of Congress and with the rules and regulations of the department, particularly described the post erected at the time of the official survey at corner No. 3, particularly described two bearing trees therefrom and also properly described the post as having been erected at corner No. 4 at the time of the official survey, were inadmissible and incompetent to limit or control the description by courses and distances contained in the patent, and having so held, said, in passing, that if all of the evidence introduced by the Silver King Company to establish the original position of the posts or monuments erected by the surveyor at corners No. 3 and No. 4 had been competent, it would have been insufficient to control or overcome the courses and distances given in the patent.

This renders it necessary to refer to the evidence introduced, and received by the trial court, over the objection as to its competency interposed by the Conkling Company. Since this evidence is set out in full in our brief (pages 70 to 89) we will content ourselves in this argument with a summary of it.

First, we have the field notes of the Conkling claim, Exhibit "O," from which it appears that "P. 3 of Lot No. 580" ("Pirate King") and the northwesterly corner of this claim (Conkling) are both on line; said

latter corner being a pine post 4x4x4 firmly set, marked same U. S. 689 P. 3 for post No. 3, from which a balsam four inches in diameter bears south 4° 15' east twenty-eight feet distant, and a red pine seventeen inches in diameter, bears north 16° 15' east thirty-five feet distant, both marked U. S. 689 P. 3 B. T.; thence south 21° 9' east along the southwesterly end line of claim six hundred feet to the southwesterly corner of claim, a pine post 4x4x4, firmly set on line, marked same U. S. 689 P. 4 for post No. 4; thence north 60° 45' east along southeasterly line of claim fifteen hundred feet to post No. 1, the place of beginning, survey exterior boundaries."

We turn now to defendant's map in order that the Court may more readily appreciate the testimony of the witnesses called by the respective parties. On this map are depicted the "Nero" claim, Lot 192, the "Hope," Lot 260, the "Pirate King," Lot 580, and the "Conkling," Lot 689, that portion of the latter which is shown in hatched lines representing the 135.5 foot strip. The other claims, namely, the "Nero," the "Hope" and the "Pirate King," were placed upon the map because the field notes of the "Hope" claim tend to fix with certainty the westerly end line of the "Nero," and according to the field notes of the "Pirate King" the northwest corner of that claim is identical with the southwest corner of the "Nero," and according to the field notes of the "Conkling" claim the northwest corner of that claim is identical with the southwest corner of the "Pirate King." It appears from the field notes of the "Nero" that the claim was surveyed by Joseph Gorlinaki, long since deceased,

a U. S. deputy mineral surveyor, on April 1st, 1881, and the official survey of the "Hope" performed by the same deputy on the 16th of May, 1882; the official survey of the "Pirate King" and the "Conkling" were made by A. Jessen, the former on the 30th of January, 1888, and the latter on the 19th of November, 1889.

Now, according to the field notes of the "Hope" the eastern end of that claim was for a number of feet of its length coincident with the westerly end line of the "Nero," and in the field notes of the "Hope" (Exhibit "N") the following is found:

"Commencing at the discovery of the claim where I set a balsam post . . . marked U. S. 260 D. S. . . . from which a shaft 12 feet deep bears south 48° 45' west 151 feet distant. I run thence south 12° 40' east along the eastern end line of this claim *and the western end line of 'Nero,' Lot 192.*"

Now, Mr. R. H. Browne, a witness for the Silver King Company, testified that he was a mining engineer; that he had made a survey of portions of the "Hope" claim in the last year; that he found the discovery point called for in the field notes and also ascertained the course and distance from the discovery point to the shaft mentioned in the field notes; that he found the course to be 49° 24' west instead of 48° 45' west, as called for in the field notes, and the distance to be the same as that given in the field notes. He further testified that the difference in course as he found it recently and as given in the field notes is easily accounted for, for the simple reason that he may not have sighted upon the particular part of the

shaft that was sighted on when the original course was taken, but the difference is only 39'.

It appears from the testimony of Mr. C. P. Brooks, a civil and mining engineer of many years' experience, called as a witness for the Silver King Company, that the "Nero" claim was surveyed by Joseph Gorlinski, long since deceased, in April, 1881, while the official survey of the "Hope" was made by the same deputy in May, 1882. The witness further testified that on July 29th, 1882, he was engaged in making a survey of the "Missouri" lode, Lot 232; that at that time he found post 2 of the "Nero" (being the northwest corner) that on September 2nd, 1908, he found an old quaking asp in a mound of stones, very much rotted, but with marks still visible. These marks were U. S. 192 Post 3 ("Nero") and U. S. 580 P. 4 (Pirate King). That one post marked both corners. There was also a newer post marked (for Lot 580) ("Pirate King") that on August 27th, 1901, he was engaged in making a survey of the "Twentieth Century" lode; that he then found corner No. 4, of the Conkling marked "Post 4 U. S. 689" standing in a mound of stones; that corner No. 4 of the "Twentieth Century" as placed by him was identical with corner No. 4 on the southwest corner of the Conkling; that in June, 1907, when he was engaged in making a survey of the "San Pedro" claim he found that Post No. 4 of the Conkling had been knocked out; but he found the old mound of stones in the same place where he had found it before; that a corner of the "San Pedro" as surveyed by him was practically coincident with the southwest corner,

or post 4, of the Conkling—they were a foot or two apart; that in September, 1908, he was at that corner and found there the mound of stones for corner No. 4, but there was no post there; that the "San Pedro" post was standing where he had originally placed it; that the course and distance of the westerly end line of the Conkling from post 3 to post 4, according to the field notes, was south $21^{\circ} 8'$ east six hundred feet, and that as he has it marked in red on map Exhibit "B" it is south $21^{\circ} 12' 30''$ east six hundred feet.

Now, in the field notes of the Conkling the following is found:

"P. 3 of L. 580 ('Pirate King' lode) and north-westerly corner of this claim both on line; said latter corner being a pine post $4\frac{1}{2}$ ft. 4×4 in. firmly set; mark same U. S. 689 P. 3 from which a balsam fourteen inches in diameter bears south $4^{\circ} 15'$ east twenty-eight feet distant and a red pine seventeen inches in diameter bears north $16^{\circ} 15'$ east thirty-five feet distant, both marked U. S. 689 P. 3 B. T.; thence south $21^{\circ} 9'$ east along southwesterly end line of claim six hundred feet to the southwesterly corner of claim, a pine post four feet by four inches by four inches, firmly set on line, marked same U. S. 689 P. 4 for post No. 4."

And in the field notes of the "Pirate King" (Exhibit "M") it is stated that

"From post No. 3 a balsam pine, fourteen inches in diameter bears south $14^{\circ} 15'$ east twenty-eight feet distant, marked U. S. 580 P. 3 B. T."

Now, Mr. Brooks testified that he found a tree so marked; that his notes showed that it bears south $39^{\circ} 37'$ west twenty-six and nine-tenths feet distant, while the

field notes call for south 14° 15' east twenty-eight feet distant; that the position of the tree as he found it is represented on Exhibit "B" by a red triangle with a representation of a little pine tree and marked "Nail in red balsam;" that it is so marked upon the ground; that if he were to take the course and distance called for in the field notes of the "Pirate King" this tree would be as represented on map, (Exhibit "B") by a dotted line with a blue circle marked "B. T.;" that according to the field notes of the Conkling from this corner a red pine seventeen inches in diameter bears south 16° 16' east thirty-five feet distant marked U. S. 689 P. 3 B. T.; that he found a tree standing marked as called for; that he found the course nearly the same as that given in the field notes; that the distance was different; that it was the difference between 22.1 and 35 feet; that drawing a line between the two trees as they would be, as called for in the field notes upon which the survey for the Conkling was based, he finds that the bearing tree as he found it upon the ground and the courses and distances as called for in the field notes would place the southwest corner of the "Pirate King" substantially where he has platted it—within a foot or two.

He further testified that he found the posts at the two west end corners of the Conkling. On cross-examination the witness testified that it was utterly impossible for any surveyor to locate that corner, meaning the northwest corner of the Conkling, from those bearing trees, with the field notes as to the direction.

But all the witness meant by this was that taking the course and distance called for in the field notes to one of these bearing trees, it would establish post 3 or northwest corner of the claim in one position; while the course and distance in the field notes to the other bearing tree would place it in a slightly different position. This is made clear on his re-direct wherein he testified,

"If I lay my ruler on the west end line of the Conkling, as platted on Exhibit 'B,' I find the corners which I have designated in my answers to questions on cross-examination, to be eight and a half feet and sixteen and a half feet, respectively, westerly of the line, taking the calls in the field notes of the Conkling for those two bearing trees. It would be absolutely impossible to locate the northwest corner of the claim therefrom. The two calls do not check and you have two posts. If you take the trees, evidently the corner would be between those two trees, but, taking the courses and distances called for in the field notes, you could not locate the northwest corner. The maximum error would be fifteen feet as far as the westerly line is concerned. In determining the particular point at which I should have and did plat, I found an old stake in a mound of stones, marked U. S. 580 P. 3. That stake I was not sure of being the original stake. It did not answer the exact description as to the mound of stones there. It was the 'Pirate King' stake and alongside of it on the ground a hewn post, marked 'U. S. 689.' This was not standing in the mound. It was this mound which I selected as the particular point for this patent corner. It agreed so closely with my position of the southwest corner that I accepted it."

There was also offered and received in evidence the field notes of the "Twentieth Century" surveyed by the

witness in August, 1901. A portion of said notes reads as follows:

“142 9/10 feet to corner No. 4, identical with the corner of the location and with the corner No. 4, Lot No. 689, of the Conkling.”

These notes were made long prior to the present litigation when there could have been no object in misrepresentation and they are found to corroborate the testimony of the witness.

Mr. J. Fewson Smith, called by the Silver King Company, testified that he was a mining engineer and had been for about twenty-five years; that he made a survey in November, 1897, of the “Arctic” claim; that in making that survey he found the northwest corner of the Conkling claim; that he found as designating that corner a post in place; that he tied to that corner, that the notes of his survey show as follows:

“Corner No. 3, a pine post, four feet long, four inches square . . . Corner No. 3 of Lot No. 689 (Conkling lode) bears north 21° 9' west 132.2 feet. This corner No. 3 is on line 3-4, Lot 689 (Conkling lode) . . . I determined the northwest corner of the Conkling to which post 3 of the ‘Arctic’ was tied, by the fact that near the posts were standing, agreeing in general to the description and location in corrected relation, two large trees which are marked as bearing trees to that corner, I had a copy of the official survey of the Conkling claim with me and I used that in determining that this post was either rightly placed or very close to it. It had all the marks which the field notes call for, and I made measurements to check the position.”

Robert Gorlinski, called by the Silver King Company, testified that he was a deputy United States mineral surveyor, and had been for twenty-four years; that he surveyed the "Custer No. 2," and the "Silver Hill No. 4" in January, 1902; that he erected a post at the southwest corner of the "Custer No. 2," and made ties from that post to a post of the Conkling 689; that the courses and distances are in his official notes; that from corner No. 4, the southwest corner of the "Custer No. 2," corner No. 4 of Lot 689, the Conkling lode, and survey No. 4648, "Twentieth Century" lode, respectively bears north $76^{\circ} 59'$ east 558.3 feet; that he measured this distance correctly. He made the survey correctly and took the course and correctly reported it. By this map, Exhibit "B," the distance is correct, 558.5. The course as given on the map is also correct. * * * That he went to the northwest corner of the Conkling where he found post No. 3; that he found at the northwest corner of the Conkling a post firmly set in the ground marked "U. S. 580-P. 3," and lying down right by the side of it a post marked "U. S. 689-3." There was a mound of stone above the one that was down; that in going from the southwest corner of the "Custer" to the northwest corner of the Conkling he determined what course to take from the field notes of the Conkling * * * that he found the course and distance of the direct line between U. S. 689 post 3, as found by him, and post 4-4648 of the "Twentieth Century" (which, as we have already said, was identical with post 4 of the "Conkling") to be south $21^{\circ} 16'$ east 598.94 feet; that when he was at the northwest

corner of the Conkling he found two bearing trees. These two trees bore from the stake "U. S. 580-3, the southwest corner of the "Pirate King" as follows: "A red pine tree bears north 19° 10' east twenty-two feet;" that the tree was marked "U. S. 689 P. 3 B. T.; that the distance of that tree from that post that he found standing in the mound of stones was twenty-two feet.

Mr. Walter H. Wiley, called by the "Silver King" Company, testified that he was a mining engineer; that during the month of October, 1911, he was over the surface of the claims represented on the map, Exhibit "B," and particularly the Conkling; that his attention was called at that time to one or more bearing trees called for in the official notes of the Conkling claim; that he cut out a section of the pine tree and then had it in court, and producing the same continued as follows:

"This brown portion at the upper end indicates a portion of the block which was blazed on the tree. Since then this growth has occurred, and the annual rings shown at the end of the block show how long ago it was blazed. Counting these rings on the end of the block from the middle out to the edge of the bark there can be counted about twenty annual rings, showing that this blaze was made at least that number of years ago." (The block referred to by the witness was introduced in evidence and marked Exhibit "P.")

Mr. William A. Wilson, called by the Conkling Company, testified that in October, 1909, he was at the northwest corner of the Conkling claim, as shown on Exhibit "A;" that he found there an old post lying upon the ground marked "U. S. 689 P. 3;" also a small piece of a

corner stake two by four, standing up but rotten in the end, and set in that mound of stones, marked "U. S. 580 P. 3." This post that was lying upon the ground was within a few feet of the other small two by four, and as he lifted it up to get the reading it broke in two.

Mr. Frank Anderson, called by the Conkling Company, testified that he was a mining engineer and deputy mineral surveyor; that in September, 1908, he was at the point marked upon defendant's Exhibit "A," as the northwest corner of the Conkling; that he found there a post lying down about three feet from the point designated on the map. It was a hewed pine post five inches in diameter and 5.4 feet long, hewed at the top on three sides and scribed "U. S. 689 P. 3;" that he also found a sawed pine stake eleven and a half inches by three and a half inches out of the ground in a small mound, marked and scribed "U. S. 580 P. 3;" it was standing in a small mound of stones; that he is familiar with the Conkling field notes which call for two bearing trees at corner No. 3; that neither the place where the post was lying on the ground, nor the point where the other post was standing in the mound of stones corresponded with the distance and direction called for by the Conkling field notes; that the "Pirate King" field notes call for one bearing tree at corner or post 3; that that bearing tree is one of the bearing trees called for in the Conkling field notes; that the post he found in the ground marked "U. S. P. 3 580" was not at the place where the distances and directions from the bearing tree called for by the "Pirate King" field notes locates the point. On cross-examination he

testified that he found two bearing trees marked in the way described in the field notes of the Conkling; that taking the balsam tree which is marked both "U. S. 689 P. 3 and U. S. 580 P. 3," and running out to the position of the post from the call would make its position about twenty and a half feet to the westerly; that drawing a line through that point parallel to the west end line it would place it west of where it is on Exhibit "A" seventeen feet. That taking the pine tree according to the calls in the field notes to post and locating it, and drawing a line through that parallel to the end lines of the Conkling it would fall about three feet as near as he can measure it to the west of the end line as platted upon the map.

We have now presented, we believe, a fair summary of all the testimony bearing upon the question of the true position of the west end line of the Conkling claim as monumented at the time of the official survey.

No witness was called who claimed that he had ever seen either post 3 or post 4 of the Conkling at any other point than that claimed by the witnesses for the "Silver King" Company, or any bearing tree called for from post No. 3 of that claim, other than those testified to by witnesses of the "Silver King" Company.

Throughout the trial there was not a suggestion that either of these bearing trees testified to by the witnesses as still standing, with the marking or scribing thereon, corresponding exactly with that called for in the field notes of the Conkling Company, were not the trees called for in these notes and so marked or scribed by Mr. Jessen at the time he made his official survey of the claim. And

if these are the trees called for in the field notes of the Conkling it is thereby alone, conclusively established that corners No. 3 and No. 4 as marked by Mr. Jessen at the time of his official survey must have been substantially as claimed by the "Silver King" Company.

A suggestion has been made in behalf of the Conkling Company that there may have been two sets of bearing trees, one marked by the surveyor and afterwards obliterated, and the other marked by interested parties and now standing with the markings thereon corresponding in age to the official survey. This is, of course, not impossible, but there is nothing in the evidence to justify any such suggestion.

The evidence as we have seen is, it may be said, free from conflict. Under it the trial court could not justly reach any other conclusion than that the Conkling claim as officially surveyed for patent and then monumented, included no part or portion of the 135.5 foot strip.

The Circuit Court of Appeals clearly erred in undertaking to disturb, upon this point, the determination of the trial court, and its casual remark, that the evidence, if competent, was insufficient is seen to be wholly without justification.

See *Tighlman vs. Proctor*, 125 U. S. 136;
Kimberly vs. Arms, 129 U. S. 512;
Furrer vs. Ferris, 145 U. S. 132;
Davis vs. Swartz, 155 U. S. 631, 638;
Crawford vs. Neal, 144 U. S. 585, 596;
Thorndyke vs. Alaska etc. Mg. Co., 164 Fed.
657, 665;
State of Iowa vs. Carr, 191 Fed. 257, 263.

Now, were these field notes and this testimony competent as evidence?

We submit that where an intending vendor and purchaser of lands, either in person or by their respective agents, enter upon the premises to be conveyed, cause a survey thereof to be made, and monuments to mark the boundaries thereof are erected, they thereby fix definitely and with certainty the premises to be conveyed. If thereupon a conveyance is made of the premises which refers to the survey theretofore made, and also undertakes to describe the premises by courses and distances from one post or monument to another, and there is found to be a discrepancy between the courses and distances and the monuments which were erected at the time of the survey, the description by courses and distances must give way—the monuments erected by the parties must be given controlling effect in the interpretation of the conveyance.

This we submit is a rule so well and so long established as no longer to admit of controversy.

In *McIver vs. Walker*, 4th Wheaton, p. 444-6, this Court, speaking through Chief Justice Marshall, said at page 447:

“• • • All lands are supposed to be actually surveyed” (In the case now before this Court an official survey was required by the Act of Congress as a pre-requisite to the patent) “and the intention of the grant is to convey land according to that actual survey; consequently, if marked trees and marked corners are found conformable to the calls of the patent, or if water-courses be called for in the patent, or mountains or any other natural object, distances must be lengthened or

shortened, and courses varied, so as to conform to those objects."

We invite attention to the following cases:

- Bauer vs. Gottmanhausen, 65 Ill. 499, 502-3;
- Sawyer vs. Cox, 63 Ill. 130, 136-7;
- O'Farrell vs. Haney, 51 Cal. 125, 127-8;
- Whiting vs. Gardner, 80 Cal. 178;
- Burke vs. McGowen, 115 Cal. 481, 484-6;
- Bean vs. Bachelder (Maine), 3 Atlantic 279;
- Stetson vs. Adams (Maine), 39 Atlantic 575;
- Woods vs. West (Neb.), 58 N. W. 938;
- Robinson vs. Laurer (Oregon), 40 Pac. 1012;
- Griffin vs. Bixby, 12 N. H. 454;
- Hall vs. Davis, 36 N. H. 571.

Counsel for the Conkling Company, who drafted the amended complaint in this case, clearly recognized that if the posts or monuments erected at the time of the official survey were still standing, or if lost or destroyed the points at which they were originally placed could be established they would control the courses and distances given in the patent, and would determine the premises actually conveyed in the patent. For in paragraph 18 of the amended bill of complaint the following is found:

"And your orator further shows and alleges that the survey of said Conkling lode claim purports to have been made . . . by Adolph Jessen, now deceased; . . . that all other persons connected with the making of said survey are either dead or their whereabouts are unknown, as plaintiff is informed and believes; that said

Conkling lode mining claim is situated in a rough country at a high altitude; that the surface is covered in part with large trees and thickets of brush and undergrowth; that the yearly snowfall in the winter is very great; that none of the original marks or boundaries of said Conkling lode mining claim, referred to in said patent, are now standing; that the original place where the respective corners were marked, if marked at all, is now only a matter of speculation . . . thereby leaving your orator at this late date entirely helpless in the premises to meet the contentions now made by said defendant in reference to the boundaries of said Conkling lode mining claim to be other than is described in said patent and herein."

Evidently no one had informed counsel who drew this complaint that the bearing trees called for in the field notes from corner or post No. 3 of the Conkling lode mining claim were still standing, and that by these bearing trees alone the westerly end line of the Conkling could be substantially fixed and determined, for no reference is made in the complaint to the existence of either of these trees.

There is an especial reason why the rule which gives controlling effect to the monuments erected at the time of the official survey of a mining claim should be adhered to and rigidly enforced in the construction of a mineral patent.

It cannot be doubted that one of the purposes—indeed the main purpose—of the Act of Congress in requiring that before an application for patent is filed there must be an official survey of the claim, and that in such

survey accurate boundaries shall be definitely marked by monuments, was for the protection of owners of conflicting claims, by thus admonishing or informing them just what the boundaries of the claim were, for which the application for patent was to be made. But this beneficent purpose of the law will be wholly defeated if the department may by inserting in the patent a description of the claim by courses and distances merely, omitting any reference to either of the monuments mentioned in the field notes as having been erected by the surveyor at one end of the claim, when he surveyed the same, cause to be granted to the patentee a claim of fifteen hundred feet in length, notwithstanding that the claim as monumented in obedience to the law, is substantially short thereof.

For instance, A, the applicant, has had his claim surveyed and monumented as required by the Act; the same as so monumented conflicts not at all with a senior contiguous claim owned by B; the monuments so erected are equivalent to a declaration by A to all the world that they mark the boundaries of the premises for which he is about to apply for a patent. B observes that A's claim, as monumented does not conflict with his senior location, and relies thereon, as he had a right to do and files no adverse claim to A's application. Now, A procures a patent which, according to the description by courses and distances therein contained, would embrace or cover a claim fifteen hundred feet in length, or a hundred feet, we will say, longer than the claim according to the monuments established by the official survey, and the claim so described in the patent conflicts with the senior location of

B to the extent of this one hundred feet. Now the decision of the Circuit Court of Appeals leads to this result: That B who had a prior valid location, embracing this hundred feet, has lost the same by a failure to adverse A's application, although in such failure he was not chargeable with any fault or negligence, and A has acquired an indefeasible title to this one hundred feet in length, although he never made a valid location which covered the same, or any part thereof, and this notwithstanding the fact that the monuments which marked the boundaries of his claim as surveyed for patent, were in effect a declaration by him that he was not claiming and would not seek to obtain a patent for any portion of this one hundred feet.

This, we submit, cannot be the law.

"The reference in the patent to the official plat and survey, make the plat and the field notes of the survey a part of the description of the land granted, as fully as if they were incorporated at length in the patents. This rule is followed both by the courts of this State and by those of the United States."

Foss vs. Johnstone, 158 Cal. 119, 128.

The reference in the patent in that case was, as appears on page 125 of the decision, that it contained by way of recital the following:

"These lots are so numbered according to the official plat of the survey of the said lands, returned to the General Land Office by the Surveyor General."

3rd Lindley, Sec. 778, pages 1894-5.

In *Grand Central Mining Company vs. Mammoth Mining Company*, 36 Utah 364, 378-9, that Court said:

“• • • The further point is that in the trial of the issues raised by the complaint, the Court erred in its findings as to the correct location of the southwest corner of the Silveropolis claim.
• • •

“It is claimed by the appellant that there is no evidence to support the findings of the Court, in such particulars, and the courses and distances in the field notes of the official survey for patent, and the description in the patent from the United States shows such corner to be at a point other and different from that found by the Court.

“The courses and distances in the field notes, and in the patent, were not conclusive of the question of the true location of the established monuments of the official survey. One of the original locators of the claim testified on behalf of respondent that he was on the ground and fixed the corner stakes when the claim was located; that he assisted in the survey for the amended location, and was present and assisted in the official survey for patent, and assisted in locating and placing the corner stakes of the claim; that he was frequently upon the ground for many years thereafter, and observed and saw that the posts and monuments so fixed and placed had not been removed nor disturbed, and that they and the southwest corner of the claim, as found by the Court, were at the same points on the ground as were established and fixed when the official survey for patent was made. There is no

dispute as to the correct location of the other corners of the claim. * * * It was not shown that there was a post or monument at the point or place called for in the field notes, nor that there was a post or monument marking the southwest corner of the Silveropolis, other than, or different from, the one testified to by the witness on behalf of the respondent and as found by the Court. The testimony of such witness is also corroborated by the testimony in the record in at least some of the salient points. We think the evidence sufficient to support the finding of the Court."

The decision of the Circuit Court of Appeals in this case is also in sharp conflict with its decision in the case of Resurrection Gold Mining Company vs. Fortune Gold Mining Company, 129th Federal 668, where, at page 670, that Court said:

"The plaintiff's title rested upon a patent issued in 1894, and the description in that patent upon the survey patent made in January, 1882. The original monuments erected by the surveyor at corners 1 and 2 of the Fortune claim when he surveyed it for patent were standing upon the ground at the time of the trial. The monument erected at corner No. 4 had disappeared. The plaintiff insisted that a round stake with two blazes upon one side of it, loosely placed in the earth and surrounded by a mound of stones at a place about twenty-eight feet northwest of the point where the courses and distances run from the known corners 1 and 2, located corner No. 3 was the original monument erected by the surveyor to mark that corner, and that it was in the same place where the surveyor put the original monument in January, 1882. The patent and the field notes on which the patent

was based were introduced in evidence by the plaintiff. The recitals of the patent, so far as they are material to the questions in this case are that it is a grant of the Fortune lode mining claim known as 'Lot No. 2309;' that this claim is bounded as follows: 'Beginning at corner No. 1, a post four inches square, marked 1-2309; thence south 1° 30' west three hundred feet to corner No. 2; thence south 88° 48' east fourteen hundred and sixty-five feet to corner No. 3; thence north 1° 30' east three hundred feet to corner No. 4; thence north 88° 48' west fourteen hundred and sixty-five feet to corner No. 1 at the place of beginning,"

and at pages 671-2 the Court proceeds as follows:

"A plain and unambiguous description in a written conveyance can no more be contradicted or modified by parol evidence than any other part of a written agreement. It is only when a patent ambiguity arises in the description itself, or in the application of it to the land, that evidence *aliunde* becomes admissible for the purpose of fitting the description to the ground to which it refers, and of removing uncertainty. When the monuments called for in a conveyance do not correspond with the courses and distances there recited, such an ambiguity necessarily arises, and parol and other evidence is then admissible to remove it. In cases of this character the original monuments called for by the patent, if they still remain in place, prevail over the courses and distances noted in the description. If the monuments called had been lost or removed, the places where they were originally located may be shown by parol or other competent evidence, and if proved to the satisfaction of the jury by a fair preponderance of evidence, these original locations will prevail over the courses and distances, and control the application of the description to the land. * * * The patent in the case before us discloses no ambiguity and pre-

sented no conflict between its courses and distances and any monument for which it called at corner No. 3, because it specified no monument at that corner. There was therefore no excuse for parol evidence on the face of the patent, and the courses and distances which it contained were *prima facie* controlling and consistent, and stand with themselves.

Thereupon counsel for the plaintiff introduced in evidence the field notes of the survey, and read them into the patent for the purpose of raising the requisite ambiguity upon which its cause of action rests. These field notes recite that the monument at corner No. 3 was a post four inches square, four feet long, set two feet in the ground, marked '3-2309'; that these numbers were cut into the post, and that it stood at a place where no reference points were available. This description imported no ambiguity into the patent unless the post there described could be found or unless its original location could be proved to be at some other point than at the place where the courses and distances located the corner. In order to prove that there was such a stake at such a place, and in order to create the ambiguity which did not otherwise exist, the plaintiff introduced testimony that a round stake four inches in diameter, with two blazes, the later on the side of the earlier, with the figures '3-2309' written in lead pencil upon it, but without any figures cut into it, stood between two available points twenty-eight feet north-west of the position of the corner as indicated by the courses and distances, and the court instructed the jury that the latter stake satisfied a description of the corner post. * * * The distinguishing characteristics of the post described by the surveyor in his field notes were not the material of which it was made, its length, or its size. They were its peculiar shape, and especially the marks he put upon it for the express purpose of identifying it and

setting it apart from all others. The post was squared and the figures '3-2309' were cut into it to forever distinguish it from all other pieces of wood just as the marks on the stakes at corners 1 and 2 have clearly and conclusively identified them. If this round blazed stake with its fading pencil marks upon it stood near post at corner No. 2 and no one would hesitate for a moment to say that it was not the squared post with its carved figures described in the surveyor's notes. The post at corner No. 3, described in the notes, was square. That which the owner of the land found and testified concerning was round with two blazes of evidently different dates upon one side of it. The figures '3-2309' had been cut in the former. No figures had been cut in the latter, but the figures '3-2309' had been written upon it with lead pencil. The former stood where no reference points were available; the latter where two excellent references were within four feet of it. The latter had none of the distinguishing marks and did not satisfy the description of the former, and the instructions of the Court to the contrary cannot be sustained."

There, as here, it will be noted that the patent in describing the claim omits any reference to any posts or monuments at either of the corners 3 and 4; calling for "corners" merely; there, as here, the field notes recited that a post marked each corner and gave a description of each of the posts with the marking or scribing thereon; there, as here, the field notes were introduced for the purpose of showing thereby, and by parol evidence, that the boundaries of the "Fortune" claim, as monumented, did not agree with the description by courses and distances contained in the patent. The description in that case was

clear and free from ambiguity as is the description in the patent in this case.

But counsel for the Conkling Mining Company has heretofore said that the field notes in the "Resurrection" case were introduced without objection, as was also the testimony given.

That the Court, however, was clearly of the opinion that these notes and this evidence were competent is shown by what it said in remanding the case for a new trial. We find at p. 679 the following:

"The result of our examination of this record is that this case must be again tried. At the coming trial two important issues may be presented: First: Whether or not the round stake stands in the same place in which the square carved post called for by the field notes as the mark of corner No. 3 was originally located. * * * Upon the first issue the location of corners 3 and 4 by means of the monuments at corners 1 and 2, and the courses and distances described in the patent and in the field notes run both forward and backward from corners 1 and 2, the relations of the disputed corners and lines depends upon two theories advanced by the respective parties to various ties and references in the patent *and in the field notes of the Fortune claim, the testimony of witnesses who knew the location of the original monuments*, and other evidence which directly tends to prove or disprove the theory of either, should be received."

But we do not have to stand alone upon the well established rule that monuments are controlling. We go further than that in this case. We deny that the Land Department had any power or authority, any jurisdiction, to issue a patent for any land other than that embraced in

the official survey. The following provisions are found in Section 2325 of U. S. Revised Statutes, namely:

“A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper Land Office an application for a patent, under oath showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States Surveyor General *showing accurately the boundaries of the claim* or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent and shall file an affidavit of at least two persons that such notice has been properly posted, and shall file a copy of the notice in such Land Office. * * * The Register of the Land Office upon the filing of such application, plat, field notes, notices and affidavit, shall publish a notice that such application has been made. * * * The claimant at the time of filing this application * * * shall file with the Register a certificate of the United States Surveyor General that * * * the plat is correct, with such further description by such references to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description to be incorporated in the patent. * * * If no adverse claim shall have been filed with the register and receiver of the land office at the expiration of the sixty days of publication, it shall

be assumed * * * that no adverse claim exists."

We submit that these provisions of the Act of Congress are mandatory and compliance therewith is indispensable.

In *Gilson Asphaltum Company*, 33 L. D. 612, it is stated at pages 615-16:

"Official survey is the initial step in the proceedings for the acquisition of mineral patent. The application for patent, notice thereof, entry and patent must refer to and comport with it. It constitutes the delimitation of the claim as a unit upon the survey records of the Land Department and is the official and controlling advice of the locus and extent of the claim for which the patent proceedings are prosecuted."

And this Honorable Court in *Waskey vs. Hammer*, 223 U. S. 85, says at p. 92:

*"Mineral surveyors are appointed by the Surveyor General under Revised Statutes, Sec. 2334, and their field of action is confined to the survey of mining claims * * * and their work must be done in conformity to regulations prescribed by that officer (the Commissioner of the General Land Office) * * * within the limits of their authority. They act instead of the Surveyor General and under his direction and in that sense are his deputies. The work which they do is the work of the Government and the surveys which they make are its surveys, and the right performance of their duties is of real concern not merely to those at whose solicitation they act, but also to the owners of adjacent and conflicting claims, and of all representatives of the Government who have to*

do with the proceedings incident to applications for patent to mining claims. They alone come in contact with the land itself and have the opportunity to observe its situation and character, and the extent and nature of the work done and improvements made thereon; *and it is upon their reports that the Surveyor General makes the certificate required by the Revised Statutes, Sec. 2325, which is pre-requisite to the issuance of a patent.*"

Again, the rules and regulations of the department in force at the time the Conkling was officially surveyed (which were introduced in evidence) provide in the fourth paragraph thereof as follows:

"The deputies in making official surveys of mining claims . . . will mark all corners with appropriately inscribed rocks in place, trees not less than four inches in diameter in place; stones at least two feet long, planted on end one foot deep in the ground, or with posts four inches or more in diameter," etc.

And in the fifth paragraph:

"Corner monuments whether rocks or trees in place, or planted stones or posts will be inscribed on the side found or set facing the claim to be surveyed, thus, 'No. 1 U. S. 37,' etc., inscription to be cut three-sixteenths of an inch deep in the stone or wood."

The sixth paragraph provides for the marking of bearing trees, etc.

The seventh paragraph is as follows:

"All monuments and witness objects with their inscriptions are to be fully described in their order in the field notes of the survey to which they belong."

The ninth paragraph states “* * * This office will not consider any return of survey made, without the same embraces the following matter:

(a) Complete field notes, showing the boundary of the claim or claims * * * together with the certificate of the deputy making the survey in question, that the survey reported by him embraces *the identical ground described in the notice of location* and found within the stakes upon the ground. * * *

(d) The affidavit of two disinterested competent witnesses, that the survey ordered to be made embraces the identical ground described in the notice of location, according to which the deputy was ordered to survey and hitherto claimed thereunder. * * *

Lawful rules and regulations prescribed by the several departments of the Government have, in a particular sense, the force of law.

United States vs. Eaton, 144 U. S. 677-688;

Wilkins vs. U. S., 96 Fed. 837, 841;

Brady vs. U. S., 98 Fed. 238, 239;

Files vs. Davis, 118 Fed. 465, 468;

Caha vs. U. S., 152 U. S. 211, 218, 220.

In this case the applicant for patent complied literally with the foregoing provisions of the Act of Congress, and with the rules and regulations of the department. He caused the premises to be officially surveyed, before filing his application, and the boundaries to be accurately marked on the ground by the deputy mineral surveyor who, according to the field notes, established, as required by the regulations, posts properly scribed and marked at

each corner of the premises, and bearing trees, particularly from corner No. 3, to be properly scribed. These trees are still standing, and have daily ever since the survey proclaimed in unmistakable terms by the marking thereon, that the westerly end line of the Conkling claim was substantially as claimed by the witnesses for the petitioner, the Silver King Coalition Mines Company. In addition thereto the field notes, in conformity with paragraph 9 of the foregoing rules and regulations, contained the following certificate:

"I hereby certify that the survey of the Conkling Lode Mining Claim, in the Uintah Mining District, Summit County, Utah, and of which the foregoing are the true and *original field notes*, was made strictly in accordance with the location, notices and boundary stakes so as to embrace the identical ground located, as is shown by the accompanying affidavit of George Jacobson and Nils Lundberg, two disinterested witnesses."

Accompanying the field notes, and in compliance with the provisions of the Act of Congress, is found the following certificate by the United States Attorney General:

•
"U. S. SURVEYOR GENERAL'S OFFICE,
SALT LAKE CITY, UTAH, JUNE 20, 1890.

"I certify that the foregoing field notes of the survey of the claim of Edward P. Ferry, upon the Conkling Lode, situated in the Uintah Mining District, Summit County, Utah, furnishes such accurate description of said lode as will, if incorporated into a patent, serve fully to identify the premises, and that such reference is made therein as will perpetually fix the *locus* thereof."

But, according to the decision of the Circuit Court of Appeals, it was entirely competent for the Land Department to ignore these field notes, to ignore the rules and regulations prescribed by the department, and to ignore the provisions of the Act of Congress itself. That it was wholly competent for the Commissioner of the General Land Office to disregard the monuments erected to mark the boundaries of the claim, at the time of the official survey thereof, and, by simply ignoring the monuments in the description contained in the patent, to so expand or extend the patent as to take in territory which was not embraced within the survey of the claim. At page 559 that Court said:

"On all this evidence the department adjudged and conveyed to the patentee, a tract 'bounded, described and platted as follows,' and then set forth a boundary by course and distance, carefully describing the two posts at the east end of the claim, mentioned in the field notes, *and as carefully disregarding and omitting all reference to the two posts at the west end of the claim mentioned in the field notes*, and adjudging the second course to be 'south 60° 45' west one thousand five hundred feet to corner No. 3;' the third course to be 'south 21° 9' east six hundred feet to corner No. 4;' and the fourth course to be 'north 60° and 45' east one thousand five hundred feet to course No. 1, the place of beginning.' And adding: 'Said Lot No. 689 extending one thousand five hundred feet in length along said vein or lode, and containing twenty acres and forty-five one hundredths.'"

This we submit is a startling proposition. It means not only that the commissioner in drafting a patent may ignore the rules and regulations of the Land Depart-

ment, the monuments described in the field notes, but that he may in effect repudiate the Act of Congress itself.

Proceedings to obtain a patent to mineral lands are proceedings *in rem* and the *res* is the area *identified and fixed by the monuments of the official survey*, which must be identical in position with the locator's stakes or monuments or within the boundaries fixed thereby.

An applicant for a United States patent is not required to serve process or notice of the filing of his application, upon the owner of contiguous claims, or the owner of conflicting claims; he is required merely to publish a general notice to all the world. But he is required by the Act of Congress before he files his application, to cause the premises to be officially surveyed by or under the direction of the United States Surveyor General, and the boundaries of the claim in such survey to be accurately marked upon the ground. This undoubtedly is for the protection of, and is notice to, owners of any claim which may conflict with the claim as surveyed for patent. Thus the premises for which the application for patent is to be filed, are seized or taken into the custody of the Department—an act which is essential and indispensable to all proceedings *in rem*.

As the statute authorizes application only for the claim as officially monumented (R. S. 2325), claimants of adjoining or conflicting locations measure their rights by the positions of the official corner monuments on the ground, and act or rest in assurance that their rights are not invaded, accordingly as those monuments disclose conflict or absence of conflict with their location.

The fundamental error of the Circuit Court of Appeals is in the assumption, that when the Commissioner of the General Land Office, with the record sent up by the local officers before him, proceeded to perform the purely ministerial act of issuing patent, he had the power, and intended, to adjudicate the boundaries of the ground to which the applicant was entitled, and, in doing so, to reject the boundaries as officially monumented, and by omitting mention of the official monuments at corners Nos. 3 and 4, grant the applicant 135.5 feet in length in excess thereof.

Suppose that the description in the field notes in this particular patent had been as follows: "South 60° 45' west along the southeasterly line of Lot No. 580 'Pirate King' lode, and northwesterly side line of this claim fifteen hundred to post 3 of Lot No. 580, 'Pirate King' lode, and northwesterly corner of this claim both on line, said latter corner being a pine post 4x4x4, firmly set, mark same U. S. 689 P. 3 for post No. 3 from which a balsam fourteen inches in diameter bears south 4° 15' east twenty-eight feet distant to a red pine seventeen inches in diameter bears north 16° 15' east thirty-five feet distant, both marked U. S. 689 P. 3 B. T.; thence south 21° 9' east along the easterly line of the 'Custer No. 2,' owned by the 'Belmont' Mining Company, and along the southwesterly end line of this claim six hundred feet to corner No. 4." Such a description would have been as we shall point out, in accordance with the fact. Clearly the Belmont Company would not have been called upon to adverse the Conkling application for patent, for that

claim as surveyed and monumented, not only did not conflict with the "Custer No. 2," but in unmistakable terms the field notes stated that there was no conflict. Now, in such case is it possible that it would be competent for the commissioner of the General Land Office to issue a patent for the Conkling claim which intentionally expanded or enlarged the Conkling, as the same had been surveyed, so as to embrace and include 135.5 feet of the "Custer No. 2" claim? And would the courts be constrained to hold that the "Belmont Mining Company," the owner of the "Custer No. 2," had by its failure to adverse the application for patent to the Conkling claim, forever lost this 135.5 feet of its property? Would a like disastrous consequence be visited upon the "Belmont" notwithstanding it had expended a fortune in the developing of its "Custer No. 2" claim, and had opened and developed in the easterly 135.5 feet thereof an ore body of immense value? We think not. The "Belmont" Company would have been guilty of no negligence, no fault, in omitting to file any adverse claim. It was not required to do so, because the Conkling as officially surveyed did not at all conflict with it. The owner of the Conkling in causing the same to be so surveyed and monumented, did as we have already pointed out, unmistakably assert and give out to the "Belmont" Company that the claim for which it was about to seek patent did not at all conflict with the "Custer No. 2" claim.

Moreover, as we have already pointed out, the Conkling claim as officially surveyed and monumented, not only did not embrace any part or portion of the 135.5

feet strip, but the owner of that claim had never made a location which embraced any part or portion of this strip. This is made clear, as we have seen, by the field notes of the survey of the Conkling, wherein it is stated that the claim as surveyed embraces the *identical* ground located. It is also made clear by the amended complaint filed by the Conkling Company. For in the 14th paragraph thereof it is alleged:

“That defendant’s grantor did thereafter, and during the month of April, 1907, purchase from the ‘Belmont Mining Company,’ a corporation, for a consideration not exceeding \$150,000, as your orator is informed and believes, the ‘Custer No. 2’ and the ‘Silver Hill No. 4’ lode mining claims then owned by the said ‘Belmont Mining Company’ That said ‘Custer No. 2’ and ‘Silver Hill No. 4’ lode mining claims, Survey No. 4850 were, by Letters Patent, dated June 2nd, 1904, granted from the United States of America to the ‘Belmont’ Company; that such patent was based upon location notices antedating the location of said Conkling lode mining claim. That as patented said ‘Custer’ No. 2 and ‘Silver Hill’ No. 4 lode mining claims overlapped and included a large area of said Conkling lode mining claim as patented and described in the patent thereof, and herein, including within the said overlap all of the area of said Conkling lode mining claim included within the southwest 135.5 foot strip thereof, excepting only a small area at the northwest corner of said Conkling lode mining claim, were as hereinbefore described and particularly included within said overlap, all that portion of said 135.5 foot strip wherein said ore was discovered and contained as aforesaid.”

That the pleader understood that such overlap existed only if the Conkling patent was to be read according to the description of the claim as given in the patent therein by courses and distances, merely, ignoring and disregarding the official monuments, is made clear not only by the fact that it is alleged in the 18th paragraph, as we have seen, that the Conkling is rendered helpless by the loss or destruction of the posts to meet the contention of the Silver King Company as to the boundaries of the Conkling claim, but in the 17th paragraph of said amended complaint it is alleged:

“That neither your orator nor its said grantors were ever notified by said defendant or its grantor as it and they were in duty bound to do, of said purchase of said ‘Custer No. 2.’ and ‘Silver Hill’ No. 4 mining claims, or permitted to participate in said purchase. And ever since said purchase of said ‘Custer No. 2’ and ‘Silver Hill No. 4’ mining claims, as aforesaid, your orator since its incorporation has been and prior thereto its (grantors), and your orator is ready, able and willing to pay and contribute to defendant for the proper share and proportion, to-wit, three-fourths of the purchase price paid to said ‘Belmont Company’ for said claims, or such other or further sum as to your honors may seem meet; and here and now offers to pay the same as this Honorable Court may direct.”

Further, it is said in the opinion of the learned Circuit Court of Appeals, at page 558:

“The applicant for the land and the patent in this case had a right under the Act of Congress to locate and purchase from the United States a

mining claim fifteen hundred feet long and six hundred feet wide, and it is conceded that it claimed and applied for a patent to a tract of these dimensions."

We say no. The applicant for a patent for the Conkling claim made his application for a patent to *Lot No. 689*, or, in other words, for the premises which he had theretofore caused to be officially surveyed and monumented, by and under the direction of the United States Surveyor General, which lot or premises were erroneously described as being one thousand five hundred feet instead of thirteen hundred and sixty-four and one-half feet in length as the same had been surveyed and monumented. We say further, that the department had no jurisdiction or power to grant or issue a patent for one thousand five hundred feet in length unless the claim as surveyed and monumented equaled that length—it had no jurisdiction to award a patent for any territory which was not included within the official survey of the claim.

His Honor, Judge Marshall, before whom the question of title was tried, in his opinion, found in the record, correctly says:

"It is recited that the patentee did enter and pay for that certain mining claim designated by the Surveyor General as Lot No. 689, bounded, described and platted as follows: . . . 'Thence second course south 60° and 45' west fifteen hundred feet to corner No. 3; thence third course south 21° 9' east six hundred feet to corner No. 4; thence fourth course north 60° 45' east fifteen hundred feet to course No. 1, the place of beginning; said Lot No. 689 extending fifteen hundred feet in length along said Conkling vein. The grant is

of the mining premises before described, together with that portion of the Conkling vein and of all other veins . . . the tops or apexes of which lie inside of the surface boundary lines of said granted premises in said Lot No. 689. It is provided that the right of possession in said outside parts of said veins shall be confined to such portion thereof as lie between vertical planes drawn downward through the end lines of said Lot No. 689 . . . if the calls for courses and distances found in this description are followed, the strip is included in the Conkling patent. The defendant, however, contends that this claim was officially surveyed for patent under the direction of the Surveyor General, and that as so surveyed posts were placed upon the ground marking the southwest end line of the claim; and that giving effect to the monuments and shortening the distances to conform therewith, the strip was excluded and was substantially patented as a part of the claim owned by it. This contention is supported by the official field notes of the survey and evidence as to the existence and position of the monuments; but it is urged by the plaintiff that such evidence is inadmissible because it is said that the description in the patent is free from ambiguity. No ambiguity arises in applying this description to the ground patented; hence, an ambiguity would not be imported into this description by parol evidence. There would be force in this if the premises were correct. It is true that the description in the patent fails to call for monuments or posts at corners 3 and 4. The call for a corner is but a call for an abrupt change of direction, but the patent purports to convey Lot 689 as designated by the Surveyor General, and the description by metes and bounds is but an attempt to properly describe this lot. Now, if in applying this description to the ground, it is found that there is a con-

flict between the position of the lot as so designated and the ground included by giving effect to the call for distances the ambiguity at once arises, and it arises not by importing into the patent what is not called for but for the mere ascertainment of the meaning of the patent calls. In view of this conflict, which call is to prevail? The survey and official marking of the lot is preliminary to the application for patent. *The notice given to adverse claimant is of a claim to the ground so marked and that it was intended to convey for patent that ground and only that ground is apparent.* This is the ordinary rule where land is described by an official lot number and by metes and bounds varying therefrom."

We have found no case, know of none, which lends any support to the rule announced by the Circuit Court of Appeals. It nullifies the rules and regulations of the department in force at the time the survey for patent was made; it renders nugatory the provisions of the Act of Congress, which, as we have stated, requires that before application for patent is made the claim shall be officially surveyed, showing accurately the boundaries of the claim which shall be distinctly marked by monuments on the ground. If the rule announced by the Court of Appeals is applied, applicants for patents for mining claims may wholly ignore this requirement of the law with impunity. No survey at all need be made; no monuments whatever need be erected; for adjoining claimants are much more liable to be deceived and misled by monuments erected to mark corners or the boundaries of the claim, which conflict with the description of the claims contained in the notice required to be posted upon the ground, than

they would be if no monument whatever had been erected. Of what avail is the provision of the Act of Congress, which, as we have said, was intended to protect adjoining or conflicting claimants, if the survey when made and the monuments then erected to mark accurately the boundaries of the claims can be disregarded by the Land Department by inserting in the patent a description by courses and distances merely—ignoring every one of the monuments which had been erected in obedience to the plain provisions of the law? We believe no case will be found where any court has held, in construing a patent issued pursuant to a statute, which requires that the application for patent shall be preceded by an actual survey in the field, and that the boundaries of the premises sought to be purchased, shall be accurately marked upon the ground by monuments, that, if the description contained in the patent is free from ambiguity, these monuments so erected, notwithstanding the patent expressly refers to the field notes of the survey may be ignored and that no evidence is receivable respecting their original positions. So far as we have been able to discover, the rule uniformly recognized by the courts has been that where a deed or a patent is based upon an actual survey of the premises to be granted, in which survey the boundaries of the premises are monumented, these monuments, if their original position can be determined, are all controlling. This rule is so well established that it has been rarely called in question.

As we have before said, these patent proceedings are *in rem*. This Court in *El Paso Brick Company vs. Mc-*

Knight, 233 U. S. 250, says at page 257: "Entry by the 'local' land office issuing a final receipt is in the nature of a judgment *in rem*."

To like effect is the case of *Hamilton vs. Southern Nevada Gold & Silver Mining Co.*, in 33 Fed. 562, 565.

In 3d Lindley on Mines, Sec. 713, it is said:

"Patent proceedings are essentially *in rem*."
Many cases might be cited to like effect.

Now, seizure of the property; or taking possession by the Court or other tribunal of the *res* is indispensable to the jurisdiction of the court or other tribunal.

"Let it never be questioned that proceedings *in rem* are void *ab initio* without seizure sufficient; that there is no reliable decision, and can be none to the effect that insufficient seizure can be cured by anything less than the making of it sufficient."

Waples on Proceedings *in rem*, Sec. 42.

This Court, in *Pennoyer v. Neff*, 95 U. S. 714, in speaking of the jurisdiction of courts generally where there has been, or can be no personal service of process upon the defendant, says at page 726:

"Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken when property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the possession of the court, but that he must look to any pro-

ceedings authorized by law upon such seizure for its condemnation and sale * * *. In other words, such service may answer in all actions which are proceedings *in rem*."

Again, "a mining claim perfected under the law is property in the highest sense of the term."

Belk vs. Meagher, 104 U. S. 279-283;

Gwillam vs. Donnellan, 115 U. S. 45, 49;

Clipper Mining Company vs. Ely Mining & Land Company, 194 U. S. 220, 226-7.

"The locator of a mine without obtaining patent acquires possessory title thereto against all the world so long as he performs the annual work thereon."

Reed vs. Munn, 148 Fed. 738, 757.

"Where there is a valid location of a mining claim, the area becomes segregated from the public domain and the property of the locator."

St. Louis Mining Company vs. Montana Mountain Mining Company, 171 U. S. 650, 655;

2nd Lindley on Mines, Sec. 539, and cases cited. Secs. 542-550.

"But in all this legislation to the present time, though by appropriate proceedings and the payment of a very small sum, a legal title in the form of a patent may be obtained for such mines, the possession of a claim established according to law is fully recognized by the Acts of Congress, and the patent adds little to the security to the party in continuous possession of a mine he has discovered or bought."

Chambers vs. Harrington, 111 U. S. 350, 352-3.

“With reference to its mineral lands the government has declared that they are free and open to exploration and purchase; a positive compact is made between the Government and the discoverer and locator, whereby the latter, upon compliance with the law, is clothed with the exclusive right of possession and enjoyment * * *. If the Government, after a valid mining location has been made, could deprive a locator of his rights, his right of possession certainly would not be exclusive.”

2nd Lindley, Sec. 542, pages 1208-1209.

Hence, we see that one who has made a valid location of a lode mining claim, so long as he complies with the law, has an indefeasible title, or right to the possession of his claim. This right Congress itself may not question. It cannot be possible, therefore, that the Land Department may issue patent to one, which patent by its courses and distances would embrace the whole or part of a valid claim belonging to a third person, where the patentee had, in obedience to the statute, caused his claim to be surveyed, under the direction of the Surveyor General, and in which survey the boundaries of his claim were accurately marked by monuments on the ground, and the boundaries thus marked showed no conflict whatever with the claim of such third person, who was therefore without fault or negligence in failing to adverse the application.

But in truth, we submit, the Land Department in the present instance did not undertake, nor intend, by the issuance of the patent in question, to ignore the offi-

cial survey upon which the application for patent was based, and upon which its issuance was grounded, nor to ignore any of the monuments erected by the deputy mineral surveyor at the time of such official survey. The patent shows upon its face that the patentee had entered and paid for the premises known as the *Conkling lode mining claim*, designated by the Surveyor General as "Lot No. 689." And it was this claim, and this lot, which the patent by its very terms undertook to describe by courses and distances.

The department did not, nor did it intend, by the issuance of this patent, to so extend it as to embrace territory that was not included within the survey. It could have had no motive for so doing. To convict it of such an intent would be to convict it of a deliberate intention to override, not only its own rules and regulations, but the Act of Congress itself. The description is not:

"Thence second course south 60° and 45' west, one thousand five hundred feet; thence third course south 21° 9' east six hundred feet." But it calls for the corners 3 and 4.

The officers of the Land Department were of course familiar with the Act of Congress and with the rules and regulations requiring that the boundaries of the claim should be accurately marked upon the ground, and knew that according to the recitals in the field notes this had been done by the erection of a proper monument, properly scribed at each corner of the claim; and knew, therefore, that, by following the course given in the patent from

corner No. 2, in the direction of No. 3, at that corner, when reached, whatever the distance might be, whether 1500 feet or less, the monument called for in the field notes would be found designating it as the northwest corner of the claim; and so, also, as to corner No. 4.

In the case of *Clary vs. McGlynn*, 46 Vt., p. 347, the description in the deed there under consideration was:

"Beginning on the north side of said right, forty rods westerly from the northeast corner of said right; thence north 54° west sixty-three rods to a stake and stones; thence south 36° west 148 rods; thence north 54° west twenty-two rods to a stake; thence south 28° west twenty-five rods to a corner; thence south 26° east seventy-two rods to a corner; thence north 63° east forty-three rods to a corner; thence north 63° east forty rods to a corner; thence south 6° east eighteen rods to a corner; thence north 36° east forty-six rods to a corner; thence north 54° west twelve and a half rods to a corner; thence north 36° east right line to the place of beginning, containing eighty-two acres more or less."

The Court in its opinion, at page 354, says:

"The line in dispute, according to the description in the deed is from a corner, on a given course a given number of rods, to a corner. The deed does not say whether those corners were marked on the land. If they were not marked then they would be found by following the courses and distances given in the deed. If they were marked, then they would be found by finding the monuments by which they were marked. The language of the deed is as consistent with their being marked, as not marked. It is therefore doubtful

on that language whether they were marked or not. It was proper to give evidence to solve that doubt—and no objection or exception was taken to the giving of such evidence. That evidence showed that those corners were in effect marked by monuments. Being thus established, the authentic boundary would be a straight line from one corner to the other, notwithstanding it did not conform to the course and distance named in the deed. In this case such a straight line was marked by marked trees. This fact was also legitimate as tending to show the marked corners called for by the deed, and was in harmony with the legal rule, that in such case the line between such corners is a straight line."

There are no equitable considerations calculated to move the Court to favor the contention of the Conkling Company. Ever since that claim was surveyed for patent, fully thirty years ago, it has laid idle and nearly a quarter of a century has elapsed from the time it was surveyed for patent until the first trial was had, during all of which time it remained idle, no effort being made by any of the owners of the claim to develop it, or prove its value if it ever had any. It was not until the petitioner, the Silver King Coalition Mines Company, had by its enterprise discovered ore on the line dividing Custer No. 2 mining claim from the Conkling claim, that the owners of the Conkling Company had their cupidity awakened. When this discovery was made by the Silver King Company the then owners of the Conkling, banking upon the fact that the description contained in the patent to the Conkling claim, by courses and distances alone,

disregarding the monuments erected at the time of the survey for patent and disregarding the bearing trees to which the northwest corner or post No. 3 was tied, gave to that claim a length of fifteen hundred feet, which would take in 135.5 feet of the Custer No. 2 claim, in which a valuable deposit of ore had been discovered by the Silver King Company, that the owners of the Conkling made any claim that the claim as patented extended westerly of the official monuments erected at the time of the survey of the claim, or that the westerly end line thereof lay much farther to the west of this line which was indubitably fixed by the bearing trees which are still standing.

We may add in concluding the discussion upon this question that one might suppose from reading the decision of the Circuit Court of Appeals, that the "Silver King" Company placed its reliance upon the Act of Congress of 1904, quoted from in the Court's opinion on page. 560. But that is not the fact. The contention of the "Silver King Company" was then, as it now is, namely, that the Act was simply declaratory of the law as it had theretofore been repeatedly declared by the courts; that is to say, that when preceding a conveyance there has been an actual survey made in the field of the premises to be conveyed, at which survey the premises are distinctly monumented or marked so that its boundaries can be readily traced, and a conveyance is afterwards made which refers to the field

notes of such survey, that these monuments override or control the courses and distances given in the conveyance, in case of any discrepancy between the two. It was the Conkling Company's counsel who relied upon the Act of 1904. They insisted that this Act established a new rule which, for the first time, made the monuments on the ground, controlling, and that the Act could not be given a retroactive effect—that it did not have any application to a patent issued before its passage, and that prior to this act monuments did not control the courses and distances given in the description, when those monuments were not expressly called for in the description. This contention of counsel for the Conkling Company was made notwithstanding that by the clear provisions of U. S. Revised Statutes, Sec. 2325, a survey of the claim was required to be made prior to the application for patent, which survey was required to show accurately the boundaries of the claim and required that they should be distinctly marked by monuments on the ground.

It will be noted that the Act of 1904 was enacted on the 28th day of April of that year. It will be also noted that in the case of Grand Central Mining Company vs. Mammoth Mining Company, to which we have called attention, title to the ore bodies beneath the Silveropolis claim was tried in March, 1902. (36 Utah, pp. 370-1.)

It will be further noted that the case, Resurrection Mining Company vs. Fortune Mining Company (129 Fed.), to which we have also called attention, was decided by the Court of Appeals on the 14th day of April,

1904. The patents in both these cases were issued prior to the Act of 1904 and in both cases controlling effect, it was held, should be given to the monuments.

Respectfully submitted,

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